No. 88-620

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In The

Supreme Court of the United States

October Term, 1988

MARGARET VARMA, *et al.*,

Petitioners,

vs.

EDWARD J. BLOUSTEIN, *et al.*,

Respondents.

RUTGERS COUNCIL OF AAUP CHAPTERS, *et al.*,

Petitioners,

vs.

EDWARD J. BLOUSTEIN, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether probationary faculty members possess a constitutionally protected property and liberty interest in tenure where the decisionmakers are constrained to use only particularized criteria and tenure cannot be denied absent a finding that one or more criteria have not been met.

2. Whether the meaning and understandings of the Rutgers Regulations and policies regarding the criteria for award of tenure, whether they meaningfully constrict discretion of decisionmakers, present a genuine dispute of material fact such that summary judgment should not have been granted.

LIST OF PARTIES

The parties to this proceeding are the same parties as to the proceedings below.[1]

The petitioners, Margaret Vama and the Rutgers Council of AAUP Chapters, are not corporations.

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1. MARGARET VARMA, on behalf of herself and all others similarly situated; and RUTGERS COUNCIL OF AAUP CHAPTERS v. EDWARD J. BLOUSTEIN; President of Rutgers, The State University; T. ALEXANDER POND; Executive Vice President and Chief Academic Officer of Rutgers, The State University; NORMAN SAMUELS; Provost of the Newark Campus of Rutgers, The State University; JAMES YOUNG; fomer Provost of the Newark Campus of Rutgers, The State University; WALTER GORDON; Provost of the Camden Campus of Rutgers, The State University; KENNETH WHEELER; Provost of the New Brunswick Campus of Rutgers, The State University; JEAN PARRISH; Acting Provost of the New Brunswick Campus of Rutgers, The State University; Professors HANS FISHER, NOEMIE KOLLER, RICHARD POIRIER, PAUL FUSSELL, LAWRENCE FISHER, JANE SCANLON, HARVY FEDER and AMELIE RORTY of Rutgers, The State University; SUSAN A. COLE; Vice President for Personnel of Rutgers, The State University; ELIZABETH MITCHELL; Assistant Vice President for Faculty Affairs of Rutgers, The State University; ROBERT PACK; Associate Provost for Personnel, New Brunswick; Members of the Board of Governors of Rutgers, The State University; LINDA STAMATO; Chair; DONALD DICKERSON; Vice Chair; FLOYD BRAGG; SANFORD JAFFE; ROBERT KAPLAN; HAROLD PERL; NORMAN REITMAN; LAWRENCE S. SCHWARTZ; and DAVID WERBLIN; and all individually and in their corporate capacities; and RUTGERS, THE STATE UNIVERSITY, THE PROMOTION REVIEW COMMITTEE, of Rutgers, the State University. RUTGERS COUNCIL OF AAUP CHAPTERS v. EDWARD J. BLOUSTEIN, individually and as President; T. ALEXANDER POND, individually and as Executive Vice President; SUSAN A. COLE individually and as Vice President; ELIZABETH MITCHELL, individually and as Assistant Vice President; ADRIENNE ANDERSON, MICHAEL BONGIOVANNI, FLOYD BRAGG, PETER CARTMELL, ANTHONY CICATIELLO, DONALD DICKERSON, HAROLD PERL; NORMAN REITMAN; LAWRENCE S. SCHWARTZ; and DAVID WERBLIN; and RUTGERS, THE STATE UNIVERSITY.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners, Margaret Varma, and the Rutgers Council of AAUP Chapters, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in the above-entitled proceeding on Septembet 6, 1988.

OPINIONS BELOW

There was no opinion of the Court of Appeals, its judgment order, reprinted at page 1a of the Appendix hereto, relied on the opinion of the United States District Court for the District of New Jersey (Thompson, D.J.), which has not been published. That opinion is reprinted in the Appendix at 4a.

STATEMENT OF JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. § 1983 pursuant to 28 U.S.C. §§ 1331 and 1334, petitioners brought this action in the District of New Jersey. On January 11, 1988, the District of New Jersey granted respondents' motions for summary judgment and dismissed the complaints. *See* Appendix at 16a.

On petitioners' appeal, the Third Circuit on September 6, 1988 entered a judgment order affirming the judgment of the District Court. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Third Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV

Section 1. All persons born or naturalized in the

United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Rutgers, the State University (the University) is a public institution of higher education established pursuant to N.J.S.A. 18A:65-1, *et seq.* as the only state university of New Jersey. The named individual respondents include the President, the Executive

Vice President and Chief Academic Officer, the Vice President for University Administration and Personnel, other officers of administration, and members of the Board of Governors.

The Rutgers Council of AAUP Chapters (the AAUP) represents the faculty members at Rutgers as their statutory majority collective bargaining representative. The AAUP and the administration of Rutgers have over the years entered into a series of collective negotiating agreements governing the terms and conditions of employment for the faculty at each of the University's three campuses: Newark, New Brunswick and Camden.

The initial complaint was instituted in 1984 by the AAUP and by an individual untenured faculty member, Margaret Varma, as a class action on behalf of petitioners and all similarly situated faculty members at Rutgers. The second complaint was filed by the AAUP as class representative in 1987. Both complaints alleged that, although the faculty members had been informed of the criteria and standards they needed to fulfill in order to quality for tenure when they were initially hired, they were evaluated based upon different, undisclosed criteria, and their applications denied. The complaints allege that, had the faculty members been evaluated on the basis of the original written criteria, they would have achieved tenure. The faculty members were never given the opportunity to prepare and conduct themselves so as to effectively meet the undisclosed criteria. To make matters worse, the decisions rejecting the applicants were uninformative and perfunctory, normally consisting of only a sentence or two, and not providing more than a bald conclusion. Faculty members who successfully challenged the evaluations in the grievance procedure found that they were reevaluated by the same evaluators without the defects found in the grievance having been corrected. Predictably, the same negative decisions resulted the second, third and even fourth times around until the faculty members abandoned all hope of

a fair adjudication.

The complaints were filed on behalf of all untenured faculty members who could have obtained tenure had the promulgated Regulations been applied. They sought the due process rights of being notified of the criteria they really needed to fulfill to qualify for tenure, to be fairly judged based on the criteria of which they had notice and a fair reevaluation once defects had been found. The petitioners based their claim of entitlement to due process protections on the Regulations and interpretations available to the university community.

The procedures and criteria for promotion and tenure of faculty are found in several different sources. The promulgated rules and the official interpretations are located in sections of the University Regulations (U.R.), in the Academic Reappointment/Promotion Instructions issued each year (Instructions), and in provisions of the collectively negotiated agreement. They can also be derived from the common understandings demonstrated by uninterrupted years of practice.

The Regulations adopted by the Board of Governors establishing standards for advancement and tenure (U.R. 3.30) have been in their current form since September 1972:

> Promotions to higher ranks[2] may be made in recognition of teaching effectiveness, scholarly or creative activity, research accomplishments, professional activity, and general usefulness to the University. The weight to be given to each of these factors will be determined in the light of the duties required and to be required of the appointee.

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2. The grant of tenure is usually, although not always, accomplished by a promotion to the rank of Associate Professor. U.R. 3.30 is nonetheless relied on for the grant of tenure alone.

Appendix at 46a.

U.R. 60.2a states how the criteria and standards must be applied:

> Those responsible for academic appointments, reappointments, and promotions are to (1) base their recommendation of professional qualification as defined in paragraph 3.30, page 50.9, without discrimination because of race, religion, sex, national origin or views on any subject; (2) seek excellence; (3) utilize the judgments of faculty peers, normally including some faculty at other institutions where the position ordinarily carries tenure; (4) utilize opinions of students, especially those whose majors appear in the appropriate department.

Appendix at 47a.

U.R. 60.2-60.2a outlines the procedures to be followed by faculty members seeking tenure or promotion. It is a multi-level process involving evaluations by faculty members and academic officers from the lowest unit to the top University decisionmakers. The evaluations "normally originate at the department level." A "department committee shall provide documented evidence of the recommendee's professional qualifications." Recommendations are made by the deans or directors, with the "advice" of the tenured faculty in the department and of a school-wide faculty committee on appointments and promotions. The dean's recommendation, accompanied by the "consider(ation)" and "action" of the University section (all faculty in the field), proceeds to the president through the provosts and the office of the "executive vice-president and chief academic officer." In making his or her decisions, the president is required to be advised

by a Promotion Review Committee consisting of the provosts, the executive vice president and four senior faculty members. After making his decisions, "(t)he president refers to the Board of Governors all appointments and promotions which involve the acquiring of academic tenure, providing sufficient information about the candidate to enable the Board to arrive at an informed decision in each case." (47a-48a).

The promotion Instructions are issued annually in virtually the same form and contain specific directions and time deadlines for complying with the procedures established by the Regulations. Prescribed forms to be used by the different levels and selected statements of University policies are appended to the main body of the Instructions. The University policies "With Respect To Academic Appointments and Promotions" (49a-51a) and "On Tenure" (52a-53a) are among the policies attached.[3]

The policy "With Respect To Academic Appointments and Promotions" approved in 1969 and last amended in 1979, contains a lengthy "interpretation" setting forth with particularity the types of activities which shall be considered as fulfilling the criteria of teaching effectiveness, scholarly or creative activity, research accomplishments, professional activity and general usefulness, set forth in U.R. 3.30. The Senate also provided its interpretation concerning the "Application of Criteria":

> Those faculty members who have made the most important contributions to the University and have discharged their duties with the greatest distinction will be considered for promotion. Continued

3. These policies resulted from recommendations of the University Senate. The Senate has the duty to "advise the president" on matters of "broad educational and research policy", including "personnel practices and procedures." It consists of faculty, students, alumni and administrators.

> growth and continued contributions are required for all ranks. Advancement to a higher rank is not automatic.

Appendix at 49a.

The interpretation emphasizes that consideration for promotion must be "weighed and evaluated on the basis of duties assigned." Probationary faculty members must be advised of their assigned duties and evaluated periodically in relation to their assigned duties (50a, 45a).

While many of the terms used in the criteria appear to be vague and imprecisely defined, the interpretation seeks to provide an anchor by reference to past decisions. Judgments on the achievements of candidates for promotions "can be made only by qualified colleagues", in comparison with "the services and accomplishments of other colleagues having the same or similar duties." (49a). "The greatest care" should be exercised in promotions carrying tenure, and it is desirable to take into consideration "comparisons of a person's effectiveness with respect to colleagues in this university and also professional standing with respect to colleagues in the relevant field elsewhere." (51a).

The Senate policy "On Tenure", adopted in 1976, provides:

> I. Rutgers University adheres to the 1969 University Senate Statement entitled "Policy with Respect to Academic Appointments and Promotions." The University understands this statement as it relates to tenure to assert that tenure is not an automatic right to be awarded to all faculty members after a suitable probationary period nor does the statement mean that advancement to a higher rank is an automatic

> movement. It has been and continues to be the policy of the University to consider for promotion those members of the faculty who have made the most important contributions to the University, and who have discharged their duties with the greatest distinction.
>
> II. The University recognizes that the award of faculty tenure is not automatic and that there are two kinds of factors which must be considered in the selection process leading to tenure: (1) the application of criteria for the advancement of individual faculty members, and (2) the determination of educational needs for faculty projected over a period of years.

(Footnotes omitted, 52a).[4]

In the main section, the Instructions do not, themselves, set forth or explain the criteria. They are wholly procedural, and they explain and amplify the evaluative steps established by the Regulations. They identify the persons responsible for initiating and transmitting recommendations for promotion, and describe the responsibilities to the process of the candidate and the participants. The Instructions do make clear, nonetheless, that the discretion of the evaluators to make a decision *ad libitum* is circumscribed. The Instructions strictly limit the "materials to be used" in the tenure decision to the contents of the official personnel file, the promotion/tenure packet (which consists of the candidate's *curriculum vitae* and the recommendations at various levels), the letters of evaluation by peers at institutions

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4. This case does not involve the issue of projected "educational needs," since this factor has not been used as a reason for denial of tenure, at least in recent memory (53a, 55a).

other than Rutgers, and published documents (A227). The Instructions also prescribe numerous and particular steps to be taken by each reviewing person or body to ensure that the procedures and criteria are adhered to at each and every level (A227-232). All evaluating persons or bodies up to the Promotion Review Committee fill out a form reproduced in the Instructions which calls for both quantified ratings and substantive narrative evaluations of the candidate's fulfillment of each of the five criteria, and for an overall recommendation (A227-232).

According to the Instructions, the Promotion Review Committee's purpose is "to examine the evidence presented on its merits in each case in relation to the criteria" in U.R. 3.30, "to examine the basis and rigor of the judgments at earlier stages of review and, finally, taking all these assessments into account, to reach a recommendation concerning the candidate." (A231). After "each member assesses the degree" to which the record demonstrates satisfaction of the criteria, the Committee votes (A232). If a record provides inadequate information, it is returned to lower levels "for completion." (A232). The Committee sends its finding and an account of the principal factors in the record which have determined the finding to the President (A232). Then,

> After considering all the evidence from these diverse sources, the President makes his own recommendations for reappointment and/or promotions involving the tenure ranks to the Board of Governors. The Board of Governors also considers all available information in reaching its own, final decision.

(A232).[5]

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5. In reality, only the candidacies of those who have received favorable (Cont'd)

The Instructions clearly mandate that the evaluators up through the highest levels not act as free agents. The Instructions compel evaluators to consider the evidence analyzing fulfillment of the criteria prepared at the lower levels and only that evidence.

Among both senior and junior faculty there has long been a general and consistent understanding of what the criteria mean. That understanding is informed by measuring the qualifications of those who have been granted tenure or promotions in the past, as of the time they achieved that right. The general expectation, fostered by the past administrative practice, was that if a faculty member's qualifications measured up to those of his or her senior peers at the time of their promotion or tenure, that faculty member would be promoted or tenured. This understanding was based on observation of the invariable practice of granting tenure and promotion to all those who fulfilled the criteria and performed their duties with distinction as understood by the entire University community.

In their complaints below, the AAUP and the individual petitioner alleged that the University administration did not apply the criteria as set forth in the Regulations and interpretive documents but used, instead, unpublished criteria. Candidates who wholly met the published criteria were rejected due to perceptions that their research lacked "impact", was theoretical rather than empirical or that it was illegitimate or unorthodox. In many cases, these rejections were identified as constituting

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(Cont'd)
"finding" from the Promotion Review Committee are transmitted to the Board; all others are never reviewed by the Board (A599). A positive recommendation by the Committee is tantamount to a grant of tenure or promotion (A599). A negative tenure decision at the end of the probationary period (an "up or out" decision) results in the end of employment as a professor at Rutgers (A604-605). It is the policy of the administration, to which they strictly adhere, not to rehire persons denied tenure at Rutgers in any teaching capacity (A605).

material defects by jointly appointed AAUP-University grievance committees, and the grievances of the faculty members were sustained. However, very few of the persons who filed grievances were ultimately granted promotion or tenure after the reevaluation, even though a grievance, to be sustained, must have "materially" affected the results of the original process.

Petitioners presented the courts below with additional evidence of the University's use of unpublished standards. In 1986, the University constituted an external review team (the "Corson Committee") to study the promotion process to determine its effectiveness and to recommend changes "in light of changes in the character of the university and its mission." The new "character and mission" of the University is its "aspiration to rank among the most distinguished in the Nation." (President's Charge to the Corson Committee).

The Corson Report, issued to the University's community on September 8, 1987, echoed many of the allegations in this lawsuit. The Report acknowledged that the University administration has departed from the published and established standards by imposing a new and different criteria which are not reflected in the University Regulations. Despite the fact that the published standards remain the same, the Report specifically cited "the move to new promotion standards [which] produces understandable and justifiable unease and resentment." According to the Report, "[f]aculty members . . . professed that they did not know how it [the Promotion Review Committee] worked or what were its criteria for decision making." The Report predicted that, "[a]s long as the standards imposed by the Committee appear to differ so widely from those imposed by the departments and the Deans, there will be misunderstanding and strained relations." (A628).

Respondents moved for summary judgment on the bases,

inter alia, that there was no property or liberty interests in faculty members' entitlements to tenure which merited due process protection and, even if there were such interests, that all the process due was provided by the grievance procedure. Petitioners' response addressed both the legal issues involved on the question of whether the entitlement was worthy of due process protection and the factual issues concerning the nature of the right created by the Regulations, interpretations and practices. As to the latter, petitioners submitted affidavits and exhibits setting forth genuine issues of disputed material facts concerning the meaning of the Regulations and the extent of the mutual, common understandings based on prior practices.

The District Court rejected the proffered evidence as "inadequate to resist a motion for summary judgment. . . ." (11a). The lower court proceeded to determine the issue of whether the entitlement to tenure under the Regulations was protected by due process rights. However, in doing so, the court did not apply the concepts set forth in *Board of Pardons v. Allen*, ____ U.S. ____, 107 S. Ct. 2415 (1987) and *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979). The court dismissed these cases, stating that it found that the Regulations and Instructions "do not restrict the traditional discretion of the university officials to make tenure awards." (15a). The court did not analyze whether the particular "discretion" exercised at Rutgers was the "discretion" requiring the use of judgment in applying fixed standards found to create a due process right in *Greenholtz* and *Allen* or was the "discretion" which allowed the decisionmakers simply to be not bound by the authority in question and which did not support application of the Due Process Clause.[6]

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6. Because the District Court found that there was no entitlement to due process, it did not reach the issue of whether due process was provided by the grievance procedure.

Petitioners appealed the District Court's judgment and opinion to the United States Court of Appeals for the Third Circuit. The Court of Appeals affirmed the judgment of the District Court "essentially for the reasons set forth by Judge Thompson" and entered its judgment order (3a).

REASONS FOR GRANTING THE WRIT

I.

THE LOWER COURT'S FINDING THAT PROBATIONARY FACULTY MEMBERS DO NOT POSSESS A PROPERTY AND LIBERTY INTEREST PROTECTED BY THE DUE PROCESS CLAUSE WHERE DECISIONMAKERS ARE CONSTRAINED TO USE ONLY PARTICULARIZED CRITERIA AND TENURE CANNOT BE DENIED ABSENT A FINDING THAT A SPECIFIED CRITERION HAS NOT BEEN MET IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

"From a great mass of cases, running the full gamut of control over property and liberty, there emerges the principle that statutes should be interpreted, if explicit language does not preclude, so as to observe due process in its basis meaning." *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 165 (Frankfurter, J., concurring).

This case squarely raises the issue of whether written regulations which provide that only certain criteria are to be applied in making tenure determinations create an entitlement to due process which is violated when tenure is denied based on other, unannounced criteria. The lower courts found that no such entitlements were created.

The Rutgers Regulations governing promotion and tenure

set forth particularized standards and criteria which have meaningfully restricted the discretion of the decisionmakers to grant or deny tenure to those faculty members who have completed their probationary periods. The AAUP and the individual plaintiffs contended below that the Regulations, by constraining the evaluators to consider only those criteria set forth therein as elaborated in the Instructions and interpretations, created property interests in tenure that are entitled to protection under the Due Process Clause.

In granting and affirming summary judgment dismissing petitioners' actions, the courts below failed to apply this Court's holdings in *Board of Pardons v. Allen*, ____ U.S. ____, 107 S. Ct. 2415 (1987) and *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979). Rather than apply the basic law of entitlements to the issue in this case, the lower court sculpted a special exception for those cases involving tenure decisions at institutions of higher education. The intervention of this Court is necessary to establish the principle that the same concepts of entitlement which create protectible interests under the Due Process Clause operate regarding deprivations of regarding deprivations of property and liberty under diverse circumstances involving governmental action.

University professors at Rutgers generally serve a six year probationary period before the mandatory decision on tenure or dismissal. This period constitutes a significant part of an individual's academic career, often just after completion of graduate studies, when there is an expectation that he or she will establish a track record of engaging in scholarship consonant with the standards of his or her peers. The tenure decision has wide-ranging impact on each faculty member. It determines the quality of the institution at which he or she will be able to engage in scholarship, teaching and professional activities. It determines whether he or she will be able to continue to pursue an academic career at all.

Rutgers recognizes the consequential nature of the tenure determination at the initial appointment of the faculty members and throughout their probationary periods. The factors required for promotion and tenure are set out prominently both in the individual contracts and in the Regulations. There is also the promise and commitment that the weight of each factor will not be arbitrarily determined, but will be set "in light of the duties required and to be required of the appointee."[7]

U.R. 60.2a provides the mandatory language which is often viewed as significant in finding that a constitutionally protected interest has been created. The Regulation governs all those who have been given responsibility for appointments, reappointments and promotions. They "are to".

(1) base their recommendation on the factors defined in U.R.3.30 without discrimination;

(2) seek excellence;

(3) use peer judgments at Rutgers and other comparable institutions; and

(4) use student opinions.

From the lowest to the highest levels of this process the discretion of the evaluators is constricted in a number of very significant ways. First, *only* the five criteria in U.R. 3.30 may be considered. The decision cannot be based, for example, on whether the appointee obtained a doctorate from Rutgers, Yale,

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7. This provision is distinctly intended to instruct both the faculty member and the evaluators as to the nature of the accomplishments which will ultimately be required for a favorable decision. A faculty member who, for example, has not been assigned to teach any courses cannot be adversely judged because of failure to demonstrate teaching effectiveness.

Oxford or Brigham Young. The decision cannot be based on giving decisive weight to any factor which was not part of the duties required of the faculty member. The evaluation is confined only to the enumerated factors and only to the duties actually assigned.

Second, discretion is limited not only to prohibit discrimination based on illegal factors (race, religion, sex and national origin), but also to prohibit discrimination on "views on any subject." Unorthodox, unconventional, unpopular or controversial views are not to be used as a factor apart from an analysis of the quality of the scholarship as a basis for making a negative decision, just as adherence to a prevailing view cannot be used as the basis for making a favorable decision.[8]

Third, the decisionmakers are not totally free to impose their own views as to the merits of applying the criteria to any particular faculty member, but they *must* use peer judgments. This is formalized by the process of ratings and narrative statements added to each candidate's tenure packet by the peers in the same field both in the department and on a University-wide basis as the evaluation ascends through the various levels. It is formalized in the solicitation of letters from designated lists of outside referees from other institutions. Additionally, the evaluators must consider student opinions, especially from those students who are majors in the same department as the faculty member.

The courts below confounded the analysis of whether the interests involved are worthy of due process protection by requiring that petitioners show that the grant of tenure is "automatic" to anyone who can articulate fulfillment of the basic criteria. However, there is no requirement that an entitlement to tenure be determined by mechanical operation of the criteria before

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8. This, after all, is the necessary predicate for academic freedom to flourish and for universities to fulfill their promise as the breeding ground for the advancement of knowledge and ideas.

due process applies. Rather, as with parole-release decisions, a decision on tenure is inherently subjective and predictive. It involves a similar "synthesis of record facts and personal observation filtered through the experience of the decision maker" *Greenholtz,* 442 U.S. at 8, which will be used to make the predicate judgment of whether the mandate to "seek excellence" is also fulfilled. This is not the type of discretion which permits the decisionmakers to follow any standards or none at all and allows them totally to rely on their own unencumbered views. Rather, the fact that the right to tenure is not automatic signifies only that the decisionmakers must use judgment in applying the standards which have been promulgated by the authority. This latter type of discretion does not deprive the faculty member of a protected constitutional interest in the tenure decision. It is this type of discretion which must be protected by due process, lest it be wrongly converted into an untrammeled authority to ignore the existing written regulations and statutes which have governed the relationship during the entire probationary period.

There is no hint anywhere in the Regulations or in their official interpretations that any but the five criteria may serve as the basis for the grant or denial of tenure, or that persons otherwise qualified for tenure may be denied it for reasons other than those in the criteria. To the contrary, there is a deep concern, expressed throughout the Regulations and the procedures, that evaluation according to the criteria be both accurate and well-founded in fact. The constant demands for rigor and correctness of application of the criteria, throughout the process, and the very function of the top-level Promotion Review Committee itself, belie any attempt to reserve unguided discretion to rely on other criteria. It is the Promotion Review Committee's job to:

> [E]xamine the evidence presented on its merits in each case in relation to the criteria for evaluation established by University Regulations, to examine

> the basis and rigor for the judgments at earlier stages of review and, finally, taking all these assessments into account, to reach a recommendation concerning the candidate.

This is an exhortation to assure adherence to the criteria, not a license to ignore them.

The circumstances of the University Regulations are closely analagous to the particularized features of the Nebraska parole statute reviewed in *Greenholtz v. Nebraska Penal Inmates, supra,* and are squarely embraced by the principle articulated in *Board of Pardons v. Allen, supra.*[9] The restraint on unbridled discretion is particular and meaningful. The "substantive predicate" in this case is the recognition that the faculty member, to be granted tenure, must meet the specific criteria in U.R. 3.30. The Regulations require even more. They obligate Rutgers to use only the written tenure packet prepared according to the Instructions, to utilize the judgment of faculty peers and students and to avoid discrimination on unlawful grounds or on views on any subject.

The constriction of discretion to require the exercise of judgment in applying particular standards and to not allow the decisionmaker unfettered license to make any decision with absolute impunity creates a sufficient expectation of property to

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9. Petitioners can and have shown that there is a particularized constraint of discretion in the University Regulations which require use of criteria measuring scholarship, teaching and professional activities by reference to publications, notable professional accomplishments, peer review and student opinions. These are more objective determinants than the sociological judgment of whether "the prisoner is not 'able and willing to fulfill the obligations of a law-abiding citizen.' " *Board of Pardons v. Allen, supra,* 107 S. Ct. at 2424. Consequently, petitioners place less reliance on the elements criticized by the dissent in *Board of Pardons v. Allen, supra,* 107 S. Ct. at 2422, and more emphasis on the general principles stated in *Olim v. Wakinekona,* 461 U.S. 238, 249 (1983) and *Hewitt v. Nelms,* 459 U.S. 460, 472 (1983).

be a protectible constitutional interest. Unlike the situation in *Board of Regents v. Roth,* 408 U.S. 564 (1972), where the discretion to renew a contract was not subject to any limitations for cause, here a determination that the candidate has *not* met the requirements of U.R. 3.30 as applied using U.R. 60.2a is required before a negative decision can be made.[10]

The practice under the Regulations and the mutually explicit understandings as fostered by that practice are also relevant to the determination of entitlement. Petitioners put evidence before the court that senior and junior faculty justifiably believed that if they fulfilled the criteria for tenure, they would be granted tenure, as all persons who fulfilled the criteria had been granted tenure in the past.[11]

The District Court misinterpreted the purpose of petitioners' presentation of evidence of the mutually explicit understanding reflected by prior practice and believed that petitioners were arguing that there should be an "automatic" grant of tenure to those faculty who measured up well against U.R. 3.30. This was not the thrust of the argument. Petitioners simply argued that

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10. This is even more so, because should the University decide to renew a contract after the mandatory tenure review date without making a decision under U.R. 3.30, the faculty member does *automatically* receive tenure under U.R. 60.1.

11. That evidence consisted of the sworn statement of a faculty member of many years' employment with Rutgers, who has served several times as an officer of the AAUP and and has for many years been chair of the AAUP's grievance committee. He is personally familiar with the tenure grievances of scores of faculty whom he represented before grievance arbitration committees; he is generally familiar with hundreds of others. In his capacity as AAUP officer, as grievance chair, and as faculty member, he has developed a broad and profound comprehension of the meaning of the University Regulations as understood by faculty (55a-56a).

the long-time past practice confirms the reading of the Regulations as constricting discretion by requiring adherence to the written criteria, standards and procedures. The University administration remains free to exercise its discretion within the confines of those parameters. It cannot, however, deny an application for tenure on the basis of a criterion or factor which it has not previously set forth, because by doing so it denies the faculty member of basic protections of the Due Process Clause.

Petitioners based their claims principally on the property interests in the tenured position. However, they have also articulated tangible liberty interests. One such interest is that "lawless" promotion decisions violate the First Amendment right to academic freedom. "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment." *Regents of the University of California v. Bakke,* 438 U.S. 265, 312 (1978) (Powell, J., announcing judgment and expressing his views). A central concern of academic freedom is the right of a scholar "to seek and state the truth as he sees it." As Rutgers Regulations have it, "the very nature of a university and its values to society depend on the free pursuit and dissemination of knowledge and free artistic expression." Consequently, Rutgers' Regulations demand the exercise of academic freedom:

> [E]very member of the faculty of this University is expected, in the classroom and studio, in research and professional publication, freely to discuss subjects with which he is competent to deal, to pursue inquiry therein, and to present and endeavor to maintain his opinion and conclusions relevant thereto.

In compliance with the University's expectation that individuals will present and maintain their opinions faculty

members have relied on and have taken advantage of this guarantee. Unfortunately, in some cases, their reliance has been punished. After their probationary period, faculty members who were originally hired for their expertise in these areas have been rejected for tenure or promotion because of prejudice against "Women's Studies" or against work exciting a political or gender bias.

Faculty members at Rutgers enjoy the right of all the public employees not to be discharged or denied tenure or promotion solely because of what they say. A public employee is deprived of liberty if a decision not to rehire him or her is grounded in protected speech, even if there is no obligation of the employer to renew his or her contract. *Mount Healthy City School District v. Doyle,* 429 U.S. 274, 283-284 (1977).[12] In this case, there is record evidence that faculty members do not receive tenure if their work, although recognized by peers as excellent, departs from received canons of a discipline. There is evidence that, when the faculty member's departure from the straight and narrow path of orthodoxy is ideological — such as adopting a "Marxist" or "feminist" analysis — no matter how marvelous peers judge the work, it does not merit tenure at Rutgers. *See Snitow v. Rutgers, the State University,* 103 N.J. 116, 121 (1986).

The academic freedom of a university to decide "who shall teach" is not a license to prescribe orthodoxy. *See Perry v. Sinderman, supra,* 408 U.S. at 597. Clearly established constitutional principles mandate the conclusion that the suppression of speech unpopular with those making decisions, by denying tenure or promotion to the speakers, implicates First Amendment rights, especially where the speakers were hired in

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12. The *Mount Healthy* Court relied solely upon *Perry v. Sinderman,* 408 U.S. 593 (1972) for this proposition.

the first place because of the nature of their speech. *See Sweezy v. State of New Hampshire,* 354 U.S. 234, 250 (1957).

There is also the issue of disqualification from future employment. Rutgers holds the "monopoly" on running the state University. Once a person is turned down for tenure at Rutgers, he or she may never be employed again by the only state university in the State of New Jersey. As the Supreme Court noted in *Board of Regents v. Roth, supra,* 408 U.S. at 573-574, where the state deprives the faculty member "not only of present governmental employment [at the state university] but of future opportunity for it," the foreclosure must be accomplished with full due process. In contrast with *Roth,* where "(t)he State, for example, did not invoke any regulations to bar the respondent from all other public employment in state universities," Rutgers customarily and by policy bars all faculty members denied tenure from ever again teaching as faculty at Rutgers at any one of its three campuses. This is, indeed, the "different case" referred to in *Roth*, requiring a full prior hearing before the "eligibility for a type of professional employment" be foreclosed. *Id.* at 574.

II.

THE LOWER COURTS' GRANT OF SUMMARY JUDGMENT IN THE FACE OF A GENUINE DISPUTE OF MATERIAL FACT ON THE ISSUE OF WHETHER THE REGULATION CONSTRICTED DISCRETION IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

"[S]ummary judgment will not lie if the dispute about a material fact is 'genuine', that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-248 (1986). A material fact is one which "might affect the outcome of the

suit under governing law." *Id.*

Petitioners' contention is that a constitutionally protected interest is conferred on faculty members by the published criteria and standards for tenure and promotion. A dispute over whether that interest is conferred by regulation (or by "common law" of the University) is certainly material under governing law. *See Perry v. Sinderman,* 408 U.S. 593, 601-602 (1972). A review of the record below demonstrates a sharp conflict over whether there is a requirement to abide only by the criteria in the Regulations themselves. There is also a dispute over whether there exists alongside the Regulations a mutually explicit understanding that the criteria be applied as written. If there exist factual questions as to whether a provision of "state law", regulation or procedures, or a "mutually explicit understanding", exists or rises to the level sufficient to confer a property interest, those questions are for the jury. *See, e.g., McLaurin v. Fischer,* 768 F.2d 98, 101 (6th Cir. 1985); *Casias v. City of Raton,* 738 F.2d 392, 396 (10th Cir. 1984).

The District Court dismissed petitioners' record evidence in Professor Keddie's affidavit setting forth the understandings of faculty, calling it "inadequate" to resist the motion for summary judgment. In so doing, the court below went too far. The court's job, under *Liberty Lobby,* is to decide whether there are factual issues which may reasonably be resolved by a jury in favor of either party. *Id.* at 250.

In this case, the evidence is not at all "so one-sided that one party must prevail." *Id.* at 251. In Professor Keddie's sworn statement, there can be found the wealth of experience of a senior AAUP union official and long-time faculty member, who knows first-hand the working of his employer and partner in collective negotiations. His authoritative statements that faculty who fulfilled the criteria as they were understood by the University community

were invariably tenured is far more than a mere scintilla of the evidence. A reasonable jury could conclude that the "common law" of the University provided for a right to tenure if one fulfilled the criteria, and that the former practice of the administration confirmed the petitioners' readings of the written rules and understandings of the unwritten common law.

The charge of "inadequacy" of Professor Neddie's evidence, then, constitutes an impermissible evaluation by the court of the weight of that evidence, of its credibility, and of inferences to be drawn from the evidence. The court below rejected this evidence because other courts, deciding cases about other universities, rejected superficially similar evidence. The analogies drawn by the court between Rutgers and the other schools are stretched beyond the breaking point.[13] There is thus no *legal* basis for the conclusion that plaintiffs' evidence is inadequate as a matter of law.[14] The compelling distinction is the evidence that Rutgers

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13. What the court described as evidence of "a pattern of results in past," in *Lovelace v. Southeastern Massachusetts University,* 793 F.2d 419 (1st Cir. 1986) was evidence of a single isolated statement of one Dean; this contrasts with the AAUP's evidence of decades of tenure decisions. The "rejected claims of reliance on informal policies or practices" in *Sabet v. Eastern Virginia Medical Authority,* 775 F.2d 1266, 1270 (4th Cir. 1985) and *Beitzell v. Jeffrey,* 643 F.2d 870, 877 (1st Cir. 1981), directly *contradicted* written rules; here, the facts the AAUP alleges are *consistent* with written rules.

14. The other cases which have been decided involving the issues of tenure decisions do not assist in the analysis of whether due process protections attach to the entitlement to tenure at Rutgers. In *Goodisman v. Lytle,* 724 F.2d 818, 820 (9th Cir. 1984), the "outline of relevant considerations" found *not* to constrict discretion is sharply distinguished from the written rules here which mandate certain factors for consideration, and limit consideration to only those factors. The court in *Beitzell v. Jeffrey,* 643 F.2d 870, 876 (1st Cir. 1981) found that, aside from the statement of criteria, "there is *not a word in the record* suggesting that [the University's] 'tenure' was meant to be granted routinely or to be withheld only for 'cause' . . . ." (emphasis added). There is ample

(Cont'd)

promised to adhere to these and only to these standards.

Petitioners are left with the troubling conclusion that the District Court rejected the AAUP's facts because they were in a "single affidavit". The affidavits of Wells Keddie are uncontroverted. They are concrete and detailed. They are wholly consistent with, not contrary to, the written rules. They are based on his personal experience, on the records and proceedings of Rutgers' evaluations and grievances, and on discovery from Rutgers. They are corroborated by the administration's own blue ribbon panel's investigative report. The evidence in support of petitioners' reading of the written rules, taken with all favorable inferences to which petitioners as the non-moving party are entitled, is far more than "merely colorable" and is "signifantly probative" enough to prevent the grant of summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). A reasonable jury could find that the rules were applied in the past to confer tenure.

Moreover, there was additional evidence of administrative practice, and the faculty's understanding of that practice, before the District Court. The administration's very own hired experts,

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(Cont'd)

evidence in the record here, both in the written rules themselves and in the uncontradicted history of their application, that strongly suggests that tenure at Rutgers could be "withheld only for 'cause.' " The criteria and procedures in *Lovelace v. Southeastern Massachusetts University*, 793 F.2d 419, 422 (1st Cir. 1986) which did not signify a "relinquishment of the university's normal discretion," differ dramatically from the rules at Rutgers, as applied, which particularly and in their overall tenor remove from Rutgers the right to deny tenure for reasons other than good cause. Nothing in *Kilcoyne v. Morgan*, 664 F.2d 940, 942 (4th Cir. 1981) or *Weinstein v. University of Illinois*, 811 F.2d 1097 (7th Cir. 1987) suggests that the procedures in those cases were clothed with the requirement, found prominently in the Rutgers Regulations, that only certain criteria be used.

the Corson Committee, concluded after a year of extensive study that the amount and type of work performed by faculty, which faculty had been induced by the administration to believe would meet criteria for tenure set forth in the regulations, were no longer viewed by the Promotion Review Committee as sufficient. The Corson Report speaks repeatedly of the "justifiable" disappointment felt by faculty who were hired under one dispensation, only to be evaluated at the end of a probationary period under another, without being told in the meantime that the rules had changed. The Corson Report's conclusions confirm the AAUP's analysis that the administration altered the contents of the standards, on which faculty "justifiably" relied, without advising those who would be judged thereby.

The District Court also found the AAUP's evidence lacking because nothing in the written rules "could support the extraordinary restriction on the University's ability to improve academically." (13a). The lower court's conclusion on this issue is based on three false premises. First, there is a method to allow the University to improve academically. It can, through formal adoption, establish and publish different standards for tenure. Rutgers has not done this although it certainly may do so in response to the Corson Report. Second, the AAUP does not argue that the administration may never alter the rules, or never raise the standards it uses. Obviously, had Rutgers administrators *told* faculty when they were hired that the old system was being replaced with a new, more stringent dispensation, faculty members could have chosen intelligently whether to accept the Rutgers job or go elsewhere. Third, discretion of exercising judgment within the parameters set by the authority is retained even under the existing criteria. Only those who serve with "greatest distinction" and whose contributions are "most important" shall be considered for tenure. Once consideration is begun, however, if the candidate meets the criteria in the judgment of the evaluators, he or she

must be granted tenure. The inferences on which the District Court bases this finding, are all derived from disputed facts, credibility issues.

The judgment entered below was based upon a determination of material disputed facts by the court on a motion for summary judgment. Since the factual determination was disputed and involved credibility and intent of the parties, the resolution had to be left to the jury as the trier of fact. This Court should reverse the judgment and remand the case for proceedings to determine what the written rules and practices are, and what they mean.

CONCLUSION

The faculty at our nation's revered institutions of higher education are a part of our common wealth. Their special role in advancing and developing new ideas, and in training successive generations to learn, think and grow, has long been protected by the dual cornerstones of academic freedom and academic tenure. The injustice in luring probationary faculty to teach at Rutgers for years with the promise of tenure according to prescribed rules only to be told at the last instance that the rules have changed speaks of the basic unfairness of the Rutgers' tenure process. The petition for writ of certiorari to the Court of Appeals should be granted for the reasons set forth herein.

Respectfully submitted,

PAUL SCHACHTER
REINHARDT & SCHACHTER, P.C.
Attorneys for Petitioner

APPENDIX A — JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED SEPTEMBER 6, 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-5196

MARGARET VARMA, on behalf of herself and all others similarly situated; and RUTGERS COUNCIL OF AAUP CHAPTERS,

v.

EDWARD J. BLOUSTEIN; President of Rutgers, The State University; T. ALEXANDER POND; Executive Vice President and Chief Academic Officer of Rutgers, The State University; NORMAN SAMUELS; Provost of the Newark Campus of Rutgers, The State University; JAMES YOUNG; former Provost of the Newark Campus of Rutgers, The State University; WALTER GORDON; Provost of the Camden Campus of Rutgers, The State University; KENNETH WHEELER; Provost of the New Brunswick Campus of Rutgers, The State University; JEAN PARRISH; Acting Provost of the New Brunswick Campus of Rutgers, The State University; Professors HANS FISHER, NOEMIE KILLER, RICHARD POIRIER, PAUL FUSSELL, LAWRENCE FISHER, JANE SCANLON, HARVY FEDER and AMELIE RORTY of Rutgers, The State University; SUSAN A. COLE, Vice President for Personnel of Rutgers, The State University; ELIZABETH MITCHELL; Assistant Vice President for Faculty Affairs of Rutgers, The State University; ROBERT PACK; Associate Provost for Personnel, New Brunswick; Members of the Board of Governors of Rutgers, The State University; LINDA STAMATO; Chair; DONALD DICKERSON;

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Vice-Chair; FLOYD BRAGG; SANFORD JAFFE; ROBERT KAPLAN; HAROLD PERL; NORMAN REITMAN; LAWRENCE S. SCHWARTZ; and DAVID WERBLIN; and all individually and in their corporate capacities; and RUTGERS, THE STATE UNIVERSITY, THE PROMOTION REVIEW COMMITTEE, of Rutgers, the State University

RUTGERS COUNCIL OF AAUP CHAPTERS

v.

EDWARD J. BLOUSTEIN, individually and as President, T. ALEXANDER POND, individually, and as Executive Vice President, SUSAN A. COLE, individually and as Vice President; ELIZABETH MITCHELL, individually and as Assistant Vice President; ADRIENNE ANDERSON, MICHAEL BONGIOVANNI, FLOYD BRAGG, PETE CARTMELL, ANTHONY CICATIELLO, DONALD DICKERSON, HAROLD PERL, JAMES USRY, WALTER WECHSLER, individually and as Governors; NORMAN SAMUELS, WALTER GORDON, KENNETH WHEELER, individually and as Provosts; the PROMOTION REVIEW COMMITTEE; and RUTGERS, THE STATE UNIVERSITY,

Margaret Varma and Rutgers
Council of AAUP Chapters,
Appellants.

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Nos. 84-2332 and 87-1329)
District Judge: Honorable Anne E. Thompson

Submitted under Third Circuit Rule 12(6)

Appendix A

August 30, 1988

BEFORE: SLOVITER, GREENBERG, and COWEN,
Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellants and essentially for the reasons set forth by Judge Thompson in her comprehensive written opinion dated January 11, 1988 and reprinted at page 690 in the appendix, it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellants.

BY THE COURT,

s/ Morton A. Greenberg
Circuit Judge

ATTEST:

s/ Sally Mrvos
Sally Mrvos, Clerk

DATED: SEP 6 1988

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY DATED JANUARY 11, 1988

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 84-2332 (AET)

MARGARET VARMA, etc., et al.,

Plaintiffs

v.

EDWARD J. BLOUSTEIN, President of Rutgers, etc., et al.

Defendants

OPINION

THOMPSON, District Judge

Appearances:

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Appendix B

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This matter is before the court on motion filed by defendants for summary judgment dismissing the complaint. The allegations giving rise to this action have been outlined in prior decisions of the court. As summarized by this court's opinion of June 9, 1986, plaintiff Varma claims that when her candidacy for tenure was considered by Rutgers University, the defendants failed to adhere to the standards for tenure set-forth in the University regulations and instructions, thereby violating her rights to due process under the U.S. and N.J. State Constitutions. Both parties accept the well-established principle of *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) that a property interest protected by the due process clause of the Fourteenth Amendment exists only if there is a "legitimate claim of entitlement," and not merely a unilateral expectation. As noted by the court in its earlier June 1986 decision which considered other matters, the issue of whether a protected property interest exists requires an examination of whether the tenure procedures were intended to be a significant and substantive restriction on the discretion of the University. *See Goodisman v. Lytle,* 724 F.2d 818, 820 (9th Cir. 1984). Defendants maintain that the relevant University regulations and instructions clearly indicate that Varma and other junior faculty members at Rutgers had no protected property or liberty interest in being awarded tenure and that summary judgment against plaintiff should be granted as a matter of law.

The procedures for faculty reappointment and tenure review are set forth and explained in the University Regulations and

Instructions, *See* Regulation 60.2-60.2a. The process is multileveled and begins with a recommendation by the tenured faculty at or above the candidate's proposed rank along with department chair. The candidate's promotion packet is then forwarded to the appropriate college's Appointments and Promotions Committee and the dean of the college. The candidate is then considered by a university-wide peer Section Committee, where appropriate, and forwarded to the Provost or Executive Vice-President. The materials are then forwarded to the Promotion Review Committee, a body of senior faculty and university administrators appointed to make faculty promotion recommendations to the President. The President then makes a final recommendation to the Board of Governors, which has the ultimate authority to make decisions involving tenure appointments and promotions. In addition, the Agreement between the faculty and the University provides for a detailed grievance procedure whereby a faculty member denied tenure may seek redress for alleged improprieties during the tenure review process.

Both parties focus on a series of statements within the Regulations and Instructions, in particular Regulation 3.30, entitled "Promotions," which provides:

> Promotions to higher ranks may be made in recognition of teaching effectiveness, scholarly or creative activity, research accomplishments, professional activity, and general usefulness to the University. The weight to be given to each of these factors will be determined in the light of the duties required and to be required of the appointee.

Regulation 60.2a further adds:

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> Those responsible for academic appointments, reappointments, and promotions are to (1) base their recommendation of professional qualifications as defined in paragraph 3.30, page 50.9, without discrimination because of race, religion, sex, national origin, or views on any subject; (2) seek excellence; (3) utilize the judgments of faculty peers, normally including some faculty at other institutions where the position ordinarily carries tenure; (4) utilize opinions of students, especially those with majors in the appropriate department.

The factors for awarding tenure are discussed further in the Instructions, particularly in the University Senate Policy Statements appended to the Instructions. Appendix D to the Instructions, entitled Policy With Respect to Academic Appointments and Promotions explains:

> Those faculty members who have made the most important contributions to the University and have discharged their duties with the greatest distinction will be considered for promotion. Continued growth and continued contributions are required for all ranks. Advancement to a higher rank is not automatic.

The statement continues:

> It is exceedingly difficult to measure and judge the various areas of activity. Judgment in these matters can be made only be qualified colleagues . . . . Such subjective judgment by persons competent

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> to evaluate duties, responsibilities, services, and accomplishments will protect the interest of professors themselves, the department, the college, the University, and the students better than any objective rating that could be devised.

Summary judgment may be entered by a court under FED. R. CIV. P. 56(c) when the moving party demonstrates the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 54 U.S.L.W. 4775, 4777 (1986). Opponents to a motion for summary judgment may not rest on the mere allegations or denials of its pleadings, but must set forth specific facts showing there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.,* 54 U.S.L.W. 4755, 4757 (1986). Thus, where there has been adequate time for discovery, if upon motion the respondent fails to make a showing sufficient to establish the existence of an element essential to its case and on which it has the burden of proof, summary judgment may be entered against it. *Celotex Corp., supra* at 4777. Where the relevant University procedures and regulations for awarding tenure are set forth before the court as is the case here, summary judgment on the issue of whether a protected property interest exists is appropriate. *See, e.g., Goodisman, supra* at 818; *Kilcoyne v. Morgan,* 664 F.2d 940 (4th Cir. 1981), *cert. denied,* 456 U.S. 928 (1982).

The issue before the court is whether these tenure procedures and standards sufficiently restrict the discretion of the University such that plaintiffs can claim more than a subjective expectation of promotion. *Perry v. Sinderman,* 408 U.S. 593, 601-2 (1972). As the Third Circuit instructed in its affirmance of this court's aforementioned June 1986 opinion, the mere fact that specific procedures for tenure evaluations have been set out does not create property interests protected by the Due Process clause, even if

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they may give rise to a claim for breach of contract. *Kovats v. Rutgers, The State University,* 822 F.2d 1303, 1314 (3d Cir. 1987). Defendants rely on several cases which have considered particular university regulations governing tenure criteria and which have concluded that these procedures do not create protected property interests. *See, e.g., Goodisman, supra; Beitzell v. Jeffrey,* 643 F.2d 870 (lst Cir. 1981); *Kilcoyne, supra.* While these decisions are not controlling here and this court must consider the particular regulations and criteria at issue at Rutgers, *Kovats, supra,* the court finds these cases instructive. The court also takes note of the fact that plaintiff, in her 70-page responsive brief does not focus on the tenure cases discussed by plaintiffs, but instead relies on cases involving particular regulations in vastly different fields such as government construction contracts and inmate parole decisions.

In *Beitzell,* after surveying various decisions and stating that in the absence of unusual circumstances, in no case it had examined had a court found that probationary university professors had a property right in a tenure appointment, the court concluded that the tenure criteria at issue there created neither "objective standards creating an automatic right to tenure" nor a reasonable expectation of a tenure grant. 643 F.2d at 875-6. The court found that the tenure criteria, which generally conformed to those recommended by the American Association of University Professors and comparable to those at many universities, merely reiterated the traditional criteria for academic promotions of teaching, scholarship, and service. As the court discussed, it is wellaccepted that the educational function of a university requires a wide range of discretion in making the initial tenure award and generally calls for the exercise of subjective judgment concerning the qualifications of the candidate and the needs of the university community. *Id.* at 875.

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Similarly, the court in *Goodisman* also considered whether the existence of substantive criteria to be employed in the making of tenure recommendations rendered a tenure award a protected property interest. The court found that the provision of relevant considerations such as ability in teaching or research, respect from colleagues, and service to the University, did not so constrict the University's discretion so as to create a constitutionally-protected interest. 724 F.2d at 820-1.

The court has now reviewed the criteria and procedures for tenure evaluations utilized at Rutgers. The court finds that the guidelines set forth in Regulation 3.30, and as further explicated in the aforementioned Senate Statement, does not provide the significant substantive restrictions on University discretion in tenure appointments required to create a protected property interest. On the contrary, in Regulation 3.30 the University merely has set forth general standards of excellence in teaching, scholarship and research, professional activity, and usefulness to the University that would be common to any tenure evaluation process at a major academic institution. The Senate Statement on Academic Promotions clearly states that promotion is considered only for faculty who have excelled and that "advancement to a higher rank is not automatic." It further counsels that promotion requires the exercise of subjective judgment on the part of the evaluators and rejects the idea of an objective rating system. It also specifically notes that the most critical step in the process is the appointment to a tenured position, recognizing that once such a grant is made, the University loses its freedom to dismiss, except for cause. In addition, the Senate Statement on Tenure, Appendix F to the Instructions, also expressly states that in considering tenure grants the University will consider two kinds of factors: criteria for the advancement of individual faculty members as well as the educational needs of the University faculty as a whole.

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Furthermore, the fact that the introduction to the Regulations states that "no rule or regulation shall be construed as to infringe in any way upon the power and authority of the Board of Governors" provides further support that there was no intent to establish a set of objective criteria to govern tenure decisions to the exclusion of the exercise of the subjective discretion of the evaluators.

Plaintiffs now seek to argue, apparently for the first time in this litigation, that a mutually explicit common understanding that there would be an "automatic" grant of tenure to probationary faculty who measure as well against the criteria of Regulation 3.30 as had past tenured members of the Rutgers faculty at the time of their promotion. Plaintiffs assert that educational needs have never been a factor in tenure evaluations at Rutgers, and seem to maintain, in essence, that the University has surrendered its ability to improve the quality of its permanent faculty through the tenure process. The court finds that such a position is untenable given the generalized nature of the Rutgers tenure criteria, the inclusion of specific references to the use of educational needs in the process, and explicit statements that the grant of tenure is not automatic. As discussed above, the Senate Statement explains that the tenure appointment is a critical decision whose end is to reward excellence and that comparisons should be made to both faculty within the department and within the appropriate academic discipline in general.

The support plaintiffs present for its position is a single affidavit recently filed by Wells Keddie, president of the Rutgers Council of AAUP Chapters, who states that this "automatic" grant of tenure previously existed. The court finds this evidence inadequate to resist a motion for summary judgment as plaintiffs have not come forward with facts showing a genuine issue for

trial exists and based upon which a reasonable jury could return a verdict for them. *Anderson, supra* at 4757. A mere pattern of results in the past is not support for a guarantee of tenure in the future *Lovelace v. Southeastern Massachusetts University,* 793 F.2d 419, 424 (1st Cir. 1986). Moreover, numerous courts routinely have rejected claims of reliance on informal policies or practices where formalized, written tenure procedures and policies exist at a University. *See, e.g., Sabet v. Eastern Virginia Medical Authority,* 775 F.2d 1266, 1270; *Beitzell supra* at 877.

Plaintiffs also refer to the Carson Report, an outside study of the tenure process at Rutgers; however, this document does not support the contention that the tenure process has created a protected property interest, although it does recognize that is more difficult for current faculty to obtain tenure. On the contrary, it explains that Rutgers is in a state of transition as a university and that faculty tension, although probably a temporary phenomenon, is present and may rise as promotions are rejected during the transition period.

Plaintiffs' reliance on *Stana v. School District of Pittsburgh,* 775 F.2d 122 (3d Cir. 1985) is inapposite. In *Stana,* the court found a protected property interest in remaining on a public school teaching eligibility list for at least two years when it was undisputed that Stana met the objective criteria for the list and uncontested by any party that a clear, well-established policy existed for maintaining names on the list for a specified period of time. *Id.* at 126. In contrast, plaintiffs here, after a reasonable time for discovery, have not presented evidence such that a jury could find that an explicit understanding existed that the University had agreed to award "automatic" tenure to all faculty who were as "qualified" as those who had been granted tenure previously. It should be noted that in *Stana* the court did not find that the

plaintiff had a protected interest in actually being granted a position once she was on the eligibility list; the school district retained its discretion to hire a teacher for an actual position whether or not she was on the list. *Id.* at 131. Furthermore, in *Stana*, the well-established, explicit understanding that potential teachers could remain on the list was not inconsistent with either the statutes regulating the school district or its educational objectives. There being nothing in the written tenure and promotion materials at Rutgers which could support the extraordinary restriction on a University's ability to improve academically which plaintiffs advance, the court finds that plaintiffs could not have had a reasonable expectation of an automatic grant of tenure and rejects this attempt to create a disputed issue of material fact.

Plaintiffs devote considerable space to its allegations that the University does not properly consider the promotion criteria or follow the correct procedures in evaluating candidates for tenure. Plaintiffs also seek to illustrate the number of grievances which are filed by denied candidates and the alleged unsatisfactory nature of the grievance process. However, the question before the court is not whether the tenure decisions of the University are correct; it does not sit as a "Super-Tenure Review Committee." *Keddie v. Pennsylvania State University,* 412 F. Supp. 1264, 1270 (M.D. Pa. 1976). The question presented here is whether a protected property interest in tenure has been created. Of course, even if no constitutional deprivation is present, plaintiffs may have a breach of contract claim if the promotion criteria or grievance process was violated in some manner. *Kovats, supra* at 1314; *Lovelace, supra* at 425; *Kilcoyne, supra* at 942.

Plaintiffs also argue that they can claim a liberty interest in receiving tenure which is protected by the Fourteenth

Amendment. However, in *Roth*, the Supreme Court rejected the position of some general liberty right to employment. 408 U.S. at 573. Instead, the Court instructed that such an interest exists only in the case of a severely defamatory charge which would seriously damage one's community standing or where a stigma was imposed that would foreclose the individual's freedom to seek other employment opportunities. *Id.* As the Court stated: "It stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains free as before to seek another." *Id.* at 575. Moreover, even if it is the policy of Rutgers not to hire in another capacity a candidate rejected for tenure, the University has not foreclosed his or her "eligibility for a type of professional employment," as plaintiffs maintain. *Id.* at 574. A faculty member denied tenure remains free to seek an educational position at another institution; the fact that the tenure process at a single state university has not recommended that a faculty member be retained simply does not suffice to implicate a constitutionally protected liberty interest. *See Beitzell, supra* at 878.

Plaintiffs also raises an argument that they have not been allowed to "teach freely" and that tenure decisions have been prejudiced against "work exciting a political or gender bias." Although teachers at state institutions possess First Amendment freedoms, by itself, the interest in holding a teaching position at a state university is not a protected free speech interest. *Roth, supra* at 575. In addition, it is well-established that the "four essential freedoms" of a university include the ability "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Regents of the University of California v. Bakke,* 438 U.S. 265, 312 (1978) (quoting *Sweeney v. New Hampshire,* 35 U.S. 234, 263 (1957). As discussed above, it is inappropriate for

the court to second-guess the judgment of a university tenure review as to the academic worth of a particular individual's research or instruction. *Keddie, supra* at 1270. The court finds insufficient support to find that plaintiffs, or other faculty similarly situated, were denied tenure on the basis of their exercise of speech protected by the First Amendment.

Finally, the court finds that the cases dealing with prisoner releases, transfers, and paroles to be unsupportive of plaintiffs' contention with respect to the tenure process at Rutgers. These decisions hold that a prison inmate has a protected liberty interest only where substantive limitations on official discretion exist in the form of particularized standards or criteria. *Olin v. Wakinekona,* 461 U.S. 238, 249 (1982); *Winsett v. McGinnis,* 617 F.2d 996, 1005-6 (3d Cir. 1980), *cert. denied, Anderson v. Winsett,* 449 U.S. 1093 (1981). As discussed at length above, the court finds that the regulations and instructions concerning tenure decisions at Rutgers do not restrict the traditional discretion of university officials to make tenure awards. Therefore, these cases do not affect the court's holding here that plaintiffs have not been deprived of any liberty or property interest protected by the Fourteenth Amendment.

Therefore, the court having found that plaintiffs have no interest in being awarded tenure which is protected by the Fourteenth Amendment of the Constitution, it need not determine whether the procedures provided by the tenure review and grievance processes afford due process. Therefore, summary judgment will be entered for defendants on the federal causes of action. Moreover, as the federal claims have been dismissed prior to trial, the court will decline to exercise pendent jurisdiction over any state law claims and the complaint will be dismissed. *United Mine Workers v. Gibbs,* 383 U.S. 715, 726 (1966).

January 11, 1988

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY DATED JANUARY 11, 1988

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Civil Action No. 84-2332

(Hon. Anne E. Thompson)

MARGARET VARMA, on behalf of : herself and all others similarly situated; and RUTGERS COUNCIL OF AAUP CHAPTERS,

Plaintiffs,

vs.

EDWARD J. BLOUSTEIN; T. ALEXANDER POND; NORMAN SAMUELS; JAMES YOUNG; WALTER GORDON; KENNETH WHEELER; JEAN PARRISH; THE PROMOTION REVIEW COMMITTEE; SUSAN A. COLE; ELIZABETH MITCHELL; ROBERT PACK; LINDA STAMATO; DONALD DICKERSON; FLOYD BRAGG; SANFORD JAFFE; ROBERT KAPLAN; HAROLD PERL; NORMAN REITMAN; LAWRENCE S. SCHWARTZ; and DAVID WERBLIN; and RUTGERS, THE STATE UNIVERSITY,

Defendants.

Appendix C

ORDER GRANTING SUMMARY JUDGMENT DISMISSING THIS ACTION

This matter having been brought before the Court on October 19, 1987 on the return of defendants' motion for summary judgment; the Court having considered the moving papers of the defendants, the response papers of the plaintiffs and the proceedings heretofore had in this cause; the attorneys for the respective parties having had the opportunity to be heard; and good cause appearing;

IT IS on this 11th day of January, 1988;

ORDERED that summary judgment is granted to defendants and the Complaint is hereby dismissed.

s/ Anne E. Thompson
ANNE E. THOMPSON, U.S.D.J.

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED JUNE 30, 1987

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 86-5413, 86-5506

GABOR G. KOVATS,
STEVEN C. PROCUNIAR, JOY L. DAVIS,
ROBERTA M. DELSON, HACE TISHLER,
and ANNA BECK

v.

RUTGERS, THE STATE UNIVERSITY, BOARD OF GOVERNORS OF RUTGERS, THE STATE UNIVERSITY, EDWARD BLOUSTEIN, as President of Rutgers, The State University and individually and JOHN R. MARTIN, as Vice-President for Personnel of Rutgers, The State University and individually; and SUSAN A. COLE, as Vice-President for Personnel of Rutgers, The State University

Rutgers, The State University; Board of Governors of Rutgers, The State University; EDWARD BLOUSTEIN; as President of Rutgers, the State University and Individually, and JOHN R. MARTIN, as Vice-President for Personnel of Rutgers, The State University and Individually,

Appellants in Nos. 86-5413 and 86-5506

On Appeal from the United States
District Court for the
District of New Jersey (Newark)
(D.C. Civil No. 82-2000)

Appendix D

Nos. 86-5472, 86-5673

MARGARET VARMA, on behalf of herself and all other similarly situated; and RUTGERS COUNCIL OF AAUP CHAPTERS

v.

EDWARD J. BLOUSTEIN; President of Rutgers, The State University, T. ALEXANDER POND; Executive Vice-President and Chief Academic Officer of Rutgers, The State University; NORMAL SAMUELS; Provost of the Newark Campus of Rutgers, The State University; JAMES YOUNG; Former Provost of the Newark Campus of Rutgers, the State University; WALTER GORDON; Provost of the Camden Campus of Rutgers, The State University; KENNETH WHEELER; Provost of the New Brunswick Campus of Rutgers, the State University; JEAN PARRISH; Acting Provost of the New Brunswick Campus of Rutgers, The State University; PROFESSORS HANS FISHER, NOEMIE KILLER, RICHARD POIRIER, PAUL FUSSELL, LAWRENCE FISHER, JANE SCANLON, HARVEY FEDER and AMELIE RORTY of Rutgers, The State University; SUSAN A. COLE; Vice-President for Personnel at Rutgers, The State University, ELIZABETH MITCHELL; Assistant Vice-President for Faculty Affairs of Rutgers, The State University; ROBERT PACK; Associate Provost for Personnel, New Brunswick; Members of the Board of Governors of Rutgers, The State University; LINDA STAMATO; Chair; DONALD DICKERSON; Vice-Chair; FLOYD BRAGG; SANFORD JAFFE; ROBERT KAPLAN; HAROLD PERL; NORMAN REITMAN; LAWRENCE S. SCHWARTZ; and DAVID WERBLIN, all individually and in their corporate capacities and RUTGERS, THE STATE UNIVERSITY the PROMOTION REVIEW COMMITTEE, of Rutgers, The State University

Appendix D

Edward J. Bloustein; T. Alexander Pond; Norman Samuels; James Young; Walter Gordon; Kenneth Wheeler; Jean Parrish; The Promotion Review Committee; Susan A. Cole; Elizabeth Mitchell; Robert Pack; Linda Stamato; Donald Dickerson; Floyd Bragg; Sanford Jaffee; Robert Kaplan; Harold Perl; Norman Reitman; Lawrence S. Schwartz; and David Werblin; and Rutgers, The State University,

Appellants in Nos. 86-5472 and 86-5673

On Appeal from the United States
District Court for the
District of New Jersey (Newark)
(D.C. Civil No. 84-2332)

Argued February 18, 1987

Before: SLOVITER and MANSMANN, *Circuit Judges*, and SCIRICA, *District Judge**

(Opinion filed June 30, 1987)

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* Hon. Anthony J. Scirica of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

Appendix D

OPINION OF THE COURT

SLOVITER, *Circuit Judge*.

I.

Issues Raised

This appeal arises from suits under 42 U.S.C. § 1983 filed by two groups of present and former faculty members against Rutgers, whose official name is Rutgers, The State University, its Board of Governors, and certain Rutgers officials in their individual and official capacities.

In the suit hereafter referred to as *Varma*, Margaret Varma alleges that she was denied tenure on the recommendation of the Promotions Review Committee, notwithstanding favorable recommendation by her department, the Appointment and Promotions Committee, and the Dean of her College.[1] Varma's complaint, as finally amended, alleges, *inter alia*, that the university and its officials refused to follow published tenure standards, and instead based denials of tenure on "secret and undisclosed standards of performance and of review, never communicated to the candidates," and gave negative tenure recommendations based both "on a

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1. The Promotions Review Committee concluded:

> The record shows a devoted teacher. However, the candidate's performance does not exhibit the quality of scholarship which would merit promotion and tenure in the responsibilities which have been assigned to her.

Varma App. (VA) at 250. The Committee reaffirmed its recommendation following reevaluation pursuant to the procedures contained in the collective bargaining agreement between Rutgers and the American Association of University Professors.

refusal to accord due respect and weight to scholarship and activities in areas of concern to . . . women, non-white people, workers, impoverished people and others traditionally excluded from full participation in the life of this society" and "on the fact that the candidate's assigned duties and their agreed-upon weights differ from the usual emphasis on classroom teaching and conventional scholarship." VA at 88-89. The complaint alleges that these acts have deprived faculty members of their rights to due process, equal protection and freedom of speech in violation of the United States Constitution, the New Jersey Constitution and 42 U.S.C. § 1983. The complaint, filed as a class action, seeks a declaration of rights, an injunction governing future promotions, reinstatement and equitable back pay for Varma and other class members, compensatory and punitive damages and costs and attorney's fees.

In the suit hereafter referred to as *Kovats*, Gabor G. Kovats, Hace Tishler, Anna Beck, Steven C. Procuniar, Joy L. Davis and Roberta M. Delson alleged that they were discharged from their faculty positions and were denied tenure, despite their service for more than seven years prior to discharge which they allege gives them de facto tenure.[2] The faculty members alleged that their terminations deprived them of their

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2. The *Kovats* plaintiffs rely on a Rutgers regulation stating:

> All full-time faculty appointments or reappointments, after a seven-year period shall be considered to be without limitation of term and the appointee shall hold office indefinitely at the pleasure of the Board of Governors and shall be said to have academic tenure.

University Regulation 60.1, Kovats App. (KA) at 35. They also rely on a Rutgers policy statement which provides: "There is a provision that an assistant professor who is reappointed after serving the probationary period thereafter enjoys the privilege of tenure." Rutgers Policy with respect to Academic Appointments and Promotions at 4, KA at 138.

property rights to tenure in violation of the Due Process Clause of the United States Constitution, the New Jersey Constitution, and 42 U.S.C. § 1983.[3]

In both actions, Rutgers and its officials in their official capacities moved for summary judgment on the basis of a claimed Eleventh Amendment immunity from suit. The officials in their individual capacities moved for summary judgment on the basis of a claimed qualified immunity. The district courts denied all summary judgment motions, *Kovats v. Rutgers*, 633 F. Supp. 1469 (D.N.J. 1986); *Varma v. Bloustein*, No. 84-2332 (D.N.J. Jun. 9, 1986), VA at 449, but certified their orders for interlocutory appeal because of the importance of the questions of law addressed. The defendants appeal. We have jurisdiction over both issues under 28 U.S.C. § 1292(b). Denial of qualified immunity is also a collateral order subject to immediate appeal. *Mitchell v. Forsyth*, 472 U.S. 511, 524-30 (1985). Our review is plenary.

The appeals raise two issues. First, is Rutgers an arm of the state such that it, and derivatively its officials in their official capacities, is entitled to Eleventh Amendment immunity from suit in federal court? Second, are Rutgers' officials in their individual capacities entitled to qualified immunity?

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3. The *Kovats* matter was before us previously in Kovats v. Rutgers, 749 F.2d 1041 (3d Cir. 1984), where we held that the district court had erred in granting Rutgers' motion for summary judgment premised on the res judicata effect of a state court ruling on the exclusivity of the grievance procedure. We held that the state court had not addressed plaintiffs' claim that they had a property interest, and remanded for the district court to "address the property issue." *Id.* at 1049. Three of the faculty members, Kovats, Tishler and Beck, apparently settled their suits. *See id.* at 1045 n.4. Thus, only Procuniar, Davis and Delson are before us now.

Appendix D

II.

Eleventh Amendment Immunity

a. *The Standard*

Rutgers contests the district courts' denial of Eleventh Amendment immunity to Rutgers; two of Rutgers' official bodies, the Board of Governors and the Promotion Review Committee; and Rutgers' officials in their official capacity. Any Eleventh Amendment immunity granted the official bodies or the officers would be derivative from the immunity of Rutgers itself, *see Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 101-02 (1984), and, therefore, if Rutgers is not entitled to Eleventh Amendment immunity, neither are its official bodies and its officers in their official capacities.

The language of the Eleventh Amendment extends only to the state itself,[4] but the Supreme Court has held that it bars actions in federal court when "the state is the real, substantial party in interest." *Pennhurst*, 465 U.S. at 101 (citations omitted).

In *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 280 (1977), the Court stated that whether an entity was an arm of the state as opposed to a non-immune municipal corporation depended "at least in part, upon the nature of the entity created by state law." It concluded that even though a city Board of Education received state funding, because Ohio law defined a local school district as a political subdivision separate from the

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4. The Eleventh Amendment states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

state and granted the Board the power to raise its own money, the Board could not be considered an arm of the state entitled to Eleventh Amendment immunity. *Id.* at 280-81.

Similarly, in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979), the Court held that in order for the interstate Regional Planning Authority (RPA), an entity created by interstate compact, to enjoy Eleventh Amendment immunity, it must be an arm of the compacting states rather than a body "comparable to a county or municipality." Further, there must be "good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves." *Id.* The Court looked to the facts that the states had disclaimed immunity, had made funding the responsibility of counties, had declared judgments against the agency to be non-binding on the state, had allowed counties to appoint a majority of agency members, and had given the agency traditionally local functions in concluding that the RPA was not an arm of the state entitled to Eleventh Amendment immunity. *Id.* at 401-02.

In this court, we have incorporated the six factors outlined by the Supreme Court in *Lake Country Estates* into a nine factor inquiry to be examined to determine when an entity should be regarded as entitled to share in the state's Eleventh Amendment immunity:

> [L]ocal law and decisions defining the status and nature of the agency involved in its relation to the sovereign are factors to be considered, but only one of a number that are of significance. Among the other factors, no one of which is conclusive, perhaps the most important is whether, in the event plaintiff prevails, the payment of the

> judgment will have to be made out of the state treasury; significant here also is whether the agency has the funds or the power to satisfy the judgment. Other relevant factors are whether the agency is performing a governmental or proprietary function; whether it has been separately incorporated; the degree of autonomy over its operations; whether it has the power to sue and be sued and to enter into contracts; whether its property is immune from state taxation, and whether the sovereign has immunized itself from responsibility for the agency's operations.

Urbano v. Board of Managers of the New Jersey State Prison, 415 F.2d 247, 250-51 (3d Cir. 1969), *cert. denied*, 397 U.S. 948 (1970); *see also Port Authority Police Benevolent Association, Inc. v. Port Authority of New York and New Jersey*, No. 86-5768, slip op. at 10-11 (3d Cir. May 27, 1987); *Skehan v. State System of Higher Education*, 815 F.2d 244, 247 (3d Cir. 1987); *Blake v. Kline*, 612 F.2d 718, 722 (3d Cir. 1979), *cert. denied*, 447 U.S. 921 (1980). We proceed to consider these criteria as they apply to Rutgers.[5]

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5. In a prior unrelated case, the same district judge who decided the *Kovats* decision before us here, applying the nine factor test, determined that Rutgers was entitled to Eleventh Amendment immunity. Miller v. Rutgers, 619 F. Supp. 1386, 1389-92 (D.N.J. 1985). That decision was premised in large part on an affidavit by Rutgers' Assistant Vice-President for Budget and Resource Studies indicating that "a judgment would be paid, at least in part, from state appropriations." *Id.* at 1389.

In *Kovats*, the court adopted *Miller's* analysis of the other *Urbano* factors and premised its contrary conclusion in large part on new financial information provided through affidavits which indicated to the court "that any judgment against [Rutgers] need not be paid from the state treasury." 633 F. Supp. at 1472. On our plenary review, we must review application of all nine criteria to Rutgers.

b. *Funding*

The primary dispute in the instant case involves the funds from which a judgment against Rutgers must be paid. The affidavits[6] establish that Rutgers has four distinct sources of income: auxiliary income derived from Rutgers' auxiliary services and restricted to use in funding those services which include dining services, room rentals and intercollegiate athletic programs; restricted income from moneys received from private or government groups and limited to use in the specific program generating the funds; general university income from tuition, fees, and investments; and state appropriations. Greenberg Affidavit, KA at 342-43. General university income and state appropriations make up approximately 72 percent of Rutgers' total income and are commingled in a general operating account which funds separate accounts used in running Rutgers' day to day operations. Greenberg Affidavit, KA at 343, 345. Somewhere between 50 and 70 percent of the general operating account is made up of state appropriations. Lettieri Affidavit, KA at 474-80. It is from this account consisting of commingled state and university funds that Rutgers would ordinarily pay a judgment entered against it in these cases. Greenberg Affidavit, KA at 344-45.

Rutgers relies on *Hall v. Medical College of Ohio at Toledo*, 742 F.2d 299 (6th Cir. 1984), *cert. denied*, 469 U.S. 1113 (1985), for the proposition that payment out of such a commingled account "has the effect of making any judgment against the school a liability payable from the state treasury." *Id.* at 305. In *Hall*,

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6. The primary affidavits in this case are provided by Marvin W. Greenberg, Rutgers' Senior Vice-President for Program Development, Budgeting and Student Services, KA at 341, and Louis M. Lettieri, Rutgers' Assistant Vice-President and Controller, KA at 474.

however, more significant than commingling was the state's ability to require that the non-state funds (tuition and fees and revenues from hospital operation) be paid to the state and reappropriated for use as state funds. *Id.* at 304. Thus, none of the funds in the commingled accounts were free from state control. Moreover, the college had no ability to raise funds free from state control. Title to property held by the college was "taken in the name of the State of Ohio." *Id.* The college could issue bonds to raise funds, but both "the issuance of such bonds and the use of the proceeds thereof [were] regulated by the legislature in great detail." *Id.* In *Port Authority Police*, where we concluded that payment by a self-supporting Authority from a fund made up of surplus revenues was considered to be funded by the state, it was particularly significant that the "uses to which the money from the Authority's General Reserve Fund may be put are strictly circumscribed by periodic legislation." *Port Authority Police*, slip op. at 8.

We have suggested that relief should not be viewed as coming from the state where an entity has the ability to pay a judgment from private funds not subject to state control. In *Blake v. Kline*, 612 F.2d at 723, we noted that by statute the Public School Employees' Retirement Board (PSERB) of Pennsylvania received funds from the state, employers, employees and its own investments. PSERB funds were set aside in two separate accounts in the state treasury under administration of the state treasurer at the direction of PSERB. One account was reserved for payment of employee benefits and was guaranteed by the state; the other served as a general fund for PSERB use. We held it was not dispositive for the Eleventh Amendment inquiry that the state contributed a majority of PSERB funds, either directly as PSERB funding or indirectly as an employer. *Id.* at 724. Instead, we remanded for

consideration whether PSERB's segregated general fund would be sufficient to pay the judgment and whether the state treasurer's control over PSERB's funds was discretionary or simply ministerial. *Id.*

Here, unlike *Hall*, the affidavits and deposition testimony demonstrate that Rutgers has substantial amounts of non-state funds in both commingled and segregated accounts out of which a judgment can be paid. Rutgers' Board of Trustees holds title to land and buildings worth more than $40 million. Reinhardt Affidavit, KA at 431. Though this property is impressed to a public trust administered by the Trustees, NJSA 18A:65-2,-26, the income from the Trustees' assets is turned over to Rutgers' Board of Governors and forms a portion of the commingled operating funds from which judgments may be paid. NJSA 18A:65-26(2); Greenberg Affidavit, KA at 343-45. Deposition testimony by Joseph Whiteside, Rutgers' financial manager, demonstrates the existence of segregated accounts held in Rutgers' name consisting solely of interest income from Rutgers' assets and available for discretionary use by Rutgers' Board of Governors. *Kovats*, 633 F. Supp. at 1474. Between 1983 and 1985 Rutgers used from $44 to $48 million in auxiliary non-state income as a pledge to bondholders. Lettieri Affidavit, KA at 475, 477-78.

Under the applicable statute Rutgers retains sole discretionary control over both its commingled and segregated accounts, subject only to audit by the state. NJSA 18A:65-25(d). Unlike the situation in *Blake*, where PSERB funds were required to be held in accounts managed by the state treasurer, Rutgers, unlike other New Jersey state agencies, is not required to manage its funds as public moneys but rather maintains its own accounts. NJSA 18A:65-25(c),(d),(g). *Compare* NJSA 52:18-31,-16.1,-20 (requirements for state management of some public

moneys). Thus, a judgment against Rutgers can be paid from non-state funds under Rutgers' discretionary control.

Rutgers contends that even a payment from non-state funds will result in indirect payment from the state treasury because of necessary increases in state budget appropriations to make up shortfalls caused by payment of judgments. According to an affidavit, Rutgers' projection of spending needs offset by its projected non-state income is factored into New Jersey's preparation of its annual appropriation to Rutgers. Greenberg Affidavit, KA at 345-49; *see also Kovats*, 633 F. Supp. at 1475; *Miller*, 619 F. Supp. at 1389-90. In this sense, as the district court noted, "a diminution in sources available for educational purposes may be reflected annually through larger appropriations. In other words, payment of retroactive damage awards may be made up by increased state funding." 633 F. Supp. at 1475.

In *Port Authority Police*, we held the authority was entitled to immunity at least in part because the governing statute provided "[u]nless . . . the revenues from operations conducted by the port authority are adequate to meet all expenditures, the legislatures of the two *states shall appropriate* [the amounts needed]." *Port Authority Police*, slip op. at 8-9 (quoting N.Y. Unconsol. Laws § 6416 (McKinney 1979)) (emphasis added). Here, however, in the statute governing Rutgers New Jersey has twice explicitly insulated itself from any liability on obligations running against Rutgers. NJSA 18A:65-8, 62-25(e). Any increase in Rutgers' state appropriation as a result of a judgment against Rutgers will be entirely the result of discretionary action by the state.

Rutgers argues that it would be anomalous if the state "must pay the cost of losing its Eleventh Amendment immunity to suit because it permits its

university to meet some of its operating expenses by the use of whatever non-state funds it can muster." Appellants' Brief at 27. The plaintiffs counter by arguing that granting immunity based on discretionary funding would be contrary to the generally accepted denial of immunity to municipalities, including those which receive funding from the state. *See Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978). Because funding alone is not dispositive of the immunity issue, those arguments miss the point. As this court stated in *Blake*, "The issue of whether payment is from the state treasury or from PSERB funds, although important, is not dispositive. It is only meaningful in light of the agency's other attributes." 612 F.2d at 724. If the state structures an entity in such a way that the other relevant criteria indicate it to be an arm of the state, then immunity may be retained even where damage awards are funded by the state at the state's discretion.[7]

c. *Status Under State Law*

On the one hand, as the district court in *Miller* stated, "the University is an instrumentality of the state. Both the statute under which Rutgers is

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7. A similar confusion is caused by the parties' arguments based on the holdings of Edelman v. Jordan, 415 U.S. 651, 66768 (1974) (Eleventh Amendment does not bar prospective injunctive relief against state officials even if necessary ancillary result is increase in spending by state), or Green v. Mansour, 474 U.S. 64, ___, 106 S. Ct. 423, 428-29 (1985) (Eleventh Amendment bars even retroactive declaratory relief against state officials if not coupled with prospective relief). Those cases address the forms of relief available when it is clear that relief will run against a state; they do not address the preliminary issue of when relief is deemed to run against the state. As to the former issue, whether the primary relief sought is monetary and/or retroactive is conclusive; as to the latter, it is not.

incorporated and case law expressly so state." 619 F. Supp. at 1389. The 1956 statute establishing Rutgers as the state university created Rutgers as a corporation which "is the instrumentality of the state for the purpose of operating the state university." NJSA 18A:65-2. New Jersey court decisions have treated Rutgers as the "alter ego of the State" and as a "full-fledged state agency." *Rutgers, The State University v. Piluso*, 60 N.J. 142, 158-59, 286 A.2d 697, 705 (1972) (holding Rutgers immune from local zoning ordinances); *Trustees of Rutgers College v. Richman*, 41 N.J. Super. 259, 298, 125 A.2d 10, 31 (1956). In addition, Rutgers' primary purpose is the provision of higher education. NJSA 18A:65-2. We have stated that "[p]roviding education has long been recognized as a function of state government." *Skehan*, 815 F.2d at 248. *See also Miller*, 619 F. Supp. at 1391; *Handsome v. Rutgers*, 445 F. Supp. 1362, 1367 n.7 (D.N.J. 1978). Rutgers is therefore distinguishable from state related entities which perform only proprietary functions.

On the other hand, Rutgers is not treated as synonymous with the state for other purposes. For example, Rutgers is not considered a part of the state for purposes of the New Jersey Contractual Liability Act, *see* NJSA 59:13-2, since Rutgers is entitled to sue or be sued and the statute excludes such entities from the definition of "state". *See Frank Briscoe Co. v. Rutgers, The State University*, 130 N.J. Super. 493, 506, 327 A.2d 687, 694 (1974).[8] Rutgers is also, unlike other state agencies, not subject to civil service laws, NJSA 18A:65-25(i) (granting Rutgers full control over

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8. Rutgers' coverage by the Tort Claims Act is not under the definition of "state", which like the Contractual Liability Act excludes entities which can sue or be sued, but by virtue of the definition of "public entities" which is "specifically intended to include" Rutgers. *See* NJSA 59:1-3 (comment).

personnel subject only to compliance with budget requirements); competitive bidding statutes, *see Rutgers, The State University v. Kugler*, 110 N.J. Super. 424, 434, 265 A.2d 847, 853 (1970); or administrative procedure requirements, NJSA 52:14B-2 (definition of state agency for purposes of New Jersey Administrative Procedure Act inapplicable to Rutgers).

d. *Suits and Immunities*

Prior to the 1956 act establishing Rutgers as the state university, Rutgers was a private entity with the power to sue and be sued. The 1956 act left Rutgers a separate corporation, NJSA 18A:65-2, and did not explicitly remove that power. As a result, Rutgers remains able to sue and be sued in state court. *See Frank Briscoe*, 130 N.J. Super. at 499-506, 327 A.2d at 690-94. The state has immunized itself from liability on judgments entered against Rutgers. NJSA 18A:65-8 ("No provision in this chapter contained shall be deemed or construed to create or constitute a debt, liability, or a loan or pledge of the credit, of the state of New Jersey.")

Rutgers does, however, share in many of the state's immunities. As a public entity, Rutgers is subject to tort suits only under the provisions of New Jersey's tort claims act. NJSA 59:1-3 (comment). Rutgers' property, like that of the state, is immune from local zoning ordinances, *see Rutgers v. Piluso*, 60 N.J. at 158-59, 286 A.2d at 705, and has been held to be "property of the State of New Jersey" exempt from property taxes. *Rutgers, the State University v. Piscataway Township*, 1 N.J. Tax 164, 171 (1980).

e. *Autonomy*

Rutgers is largely autonomous and subject only to minimal state supervision and control. There are two governing bodies. One is the Board of Governors,

which has eleven voting members of which a bare minimum, six, are appointed by the governor with the advice and consent of the senate; the remaining five are appointed by the trustees from among their members. NJSA 18A:65-14. The other is the Board of Trustees. Eleven trustees, the six appointed by the Governor to the Board of Governors and five others, are appointed by the governor with the advice and consent of the senate. NJSA 18A:65-15(I)(b). The remaining voting trustees consist of from twelve to twenty Rutgers alumni and alumnae chosen by the trustees, NJSA 18A:65-15(I)(c), and twenty five charter trustees chosen by the trustees to replace those trustees in office at the time of the statute's passage. NJSA 18A:65-15(I)(d).

Rutgers' dual governing structures evolved from Rutgers' history as a privately chartered institution made public by the 1956 statute. The trustees, who exercised sole control over Rutgers when it was a private institution, *see Rutgers v. Piluso*, 60 N.J. at 155, 286 A.2d at 703-04, have an "overall advisory capacity" and, so as not to violate the terms of the original charter, retain sole control subject to a public trust over the assets held by Rutgers prior to the 1956 act. *See* NJSA 18A:65-26. The governors exercise "general supervision over . . . the conduct of the university." NJSA 18A:65-25. In running the university, the governors and trustees are "given a high degree of self-government." NJSA 18A:65-27(I)(a). In particular, the trustees retain the power to withdraw their assets if they feel that the assets are being put to improper use. NJSA 18A:65-27(II)(c). More generally, both boards may exercise their powers "without recourse or reference to any department or agency of the state, except as otherwise expressly provided by this chapter or other applicable statutes." NJSA 18A:65-28.

Appendix D

The state places two limitations on the boards' operation of the University. First, the governors must comply with the state's budget appropriations to the university. NJSA 18A:65-25(d),(h),(i). Second, the governors must comply with state laws and regulations. *See* NJSA 18A:65-34.

The state intervention produced by these limitations is minimal. Unlike some state agencies, Rutgers is not required to manage its funds as public moneys, but rather is free to establish accounts and invest and withdraw funds as desired. NJSA 18A:65-25(c),(d),(g). *Compare* NJSA 52:18-31 ("All moneys collected through the board of fish and game commissioners under any state fish and game law shall be deposited in the state treasury"); 52:18-32 (moneys received relating to motor vehicles "shall be deposited in the state treasury"); 52:18-16.1 (State Treasurer controls deposit of public moneys with interest going to the state); NJSA 52:18-20 (only State Treasurer may withdraw state funds).

Though the boards must direct expenditures "in accordance with the provisions of the State budget," within these broad constraints individual spending decisions are not regulated beyond a requirements that the state be informed of those spending decisions. *See* NJSA 18A:65-25(d); Greenberg Affidavit, App. at 349. Moreover, as noted above, the boards are not subject to the operational constraints placed on most other state agencies. For example, they need not comply with civil service, competitive bidding or administrative procedure requirements.

f. *Conclusion*

The majority of cases addressing the question of Eleventh Amendment immunity for public colleges and universities have found such institutions to be arms of their respective states and thus immune from suit. *See*

Hall, 742 F.2d at 301-02 (citing cases). We have previously held Pennsylvania state colleges and the Pennsylvania State System of Higher Education entitled to immunity. *Skehan v. State System of Higher Education*, 815 F.2d at 249; *Skehan v. Board of Trustees of Bloomsburg State College*, 538 F.2d 53, 62 (3d Cir.) (in banc), *cert. denied*, 429 U.S. 979 (1976). On the other hand, district courts in this circuit have held that the University of Delaware, Temple University, the University of Pittsburgh and Penn State University, although affiliated with their states in varying degrees, are not alter egos of those states and therefore do not share the states' Eleventh Amendment immunity. *See Gordenstein v. University of Delaware*, 381 F. Supp. 718, 722 (D. Del. 1974); *Samuel v. University of Pittsburgh*, 375 F. Supp. 1119, 1125-28 (W.D.Pa. 1974), *aff'd in part, rev'd in part on other grounds*, 538 F.2d 991 (3d Cir. 1976) (applying not only to the University of Pittsburgh but also to Temple University and Penn State University). The decisions in other cases, while helpful in terms of analytic models, cannot govern our decision as to Rutgers because "[e]ach state university exists in a unique governmental context, and each must be considered on the basis of its own peculiar circumstances." *Soni v. Board of Trustees of the University of Tennessee*, 513 F.2d 347, 352 (6th Cir. 1975), *cert. denied*, 426 U.S. 919 (1976); *see also Hall*, 742 F.2d at 302.[9]

Our examination of the circumstances surrounding Rutgers leads us to conclude that a

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9. Since the issue of immunity was not before us in Mauriello v. University of Medicine and Dentistry of New Jersey, 781 F.2d 46 (3d Cir. 1986), the fact that we addressed the merits can have little bearing on our decision here. Moreover, because the statutes governing UMDJ and Rutgers are not identical, the immunity considerations are not necessarily the same.

majority of the relevant criteria weigh against considering Rutgers an arm of the state entitled to Eleventh Amendment immunity. Rutgers was originally a private institution. Though it is now, at least in part, a state created entity which serves a state purpose with a large degree of state financing, it remains under state law an independent entity able to direct its own actions and responsible on its own for judgments resulting from those actions.[10]

III.

Qualified Immunity

The second question raised by the district court's order pursuant to 28 U.S.C. § 1292(b) is whether those defendants who are named in their individual capacities are entitled to qualified immunity.

The governing standard for qualified immunity has been described as follows:

> [G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); *see also Malley v Briggs*, 475 U.S. 335, ___, 106 S. Ct. 1092, 1098 (1986); *Davis v. Scherer*, 468 U.S. 183, 190-91 (1984). Officials claiming qualified immunity bear the burden of pleading and proof. *See Harlow*,

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10. In light of our conclusion, we need not reach the plaintiffs' contention that the state has waived its Eleventh Amendment immunity. Our disposition of the Eleventh Amendment issue also disposes of Rutgers' contention that it, its Board of Governors and its Promotion Review Committee are not "persons" subject to suit under 42 U.S.C. § 1983 since public entities not entitled to immunity are considered "persons" subject to § 1983 actions. *See Monell*, 436 U.S. at 690 & n.55 (1978).

457 U.S. at 819; *see also Skehan v. Board of Trustees of Bloomsburg State College*, 538 F.2d at 61-62.

We have interpreted the "clearly established" language to mean that there must be "some but not precise factual correspondence" between applicable precedents and the case at issue, *People of Three Mile Island v. Nuclear Regulatory Commissioners*, 747 F.2d 139, 144-45 (3d Cir. 1984), and that officials must apply "general, well developed legal principles." *Id.*; *see also Sourbeer v. Robinson*, 791 F.2d 1094, 1103 (3d Cir. 1986); *Hicks v. Feeney*, 770 F.2d 375, 379-80 (3d Cir. 1985).

In *Kovats*, where plaintiffs claim that they held a state defined property right in the form of de facto tenure acquired by virtue of length of service under University Regulation 60.1 which triggered a right to a hearing before their discharge, the Rutgers officials moved for summary judgment essentially on the ground that there is no "clearly established" law that the regulation grants de facto tenure. The court did not directly address that issue, which is the issue on which we remanded the case. *Kovats v. Rutgers*, 749 F.2d at 1049 ("On remand, the district court should address the property issue [whether the regulations create a property interest in tenure]"). Instead, the district court decided that because the Supreme Court in *Perry v. Sindermann*, 408 U.S. 593, 599-603 (1972) and its companion case, *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972), held that university rules, policies, and understandings could give rise to a property interest in employment, the law was "clearly established at the time of plaintiffs' termination," the officials "should have related *Perry* and *Roth* to the instant situation," and therefore the officials had failed to show that they were "entitled to summary judgment on their qualified immunity defense." *Kovats*, 633 F. Supp. at 1478-79 (footnote omitted).

Appendix D

The Rutgers officials concede that were it clearly established that Rutgers' regulations provide for de facto tenure by length of service, they would not be entitled to qualified immunity because *Perry* and *Roth* established that faculty members with a property interest in their positions may not be terminated without due process of law. They claim, however, that it is not "clearly established" that University Regulation 60.1 provides de facto tenure.

They contend that unlike the college at issue in *Perry* which had no formal procedures for obtaining tenure, the Rutgers' regulations provide for a formal process of tenure grants. They argue that because numerous cases have rejected claims for de facto tenure at universities with formal tenure systems, *see Sabet v. Eastern Virginia Medical Authority*, 775 F.2d 1266, 1269-70 (4th Cir. 1985); *Beitzell v. Jeffrey*, 643 F.2d 870, 877 (1st Cir. 1981); *Davis v. Oregon State University*, 591 F.2d 493, 496 (9th Cir. 1979); *Cusumano v. Ratchford*, 507 F.2d 980, 984 (8th Cir. 1974), *cert. denied* 423 U.S. 829 (1975), the *Kovats* plaintiffs' alleged property right in de facto tenure by virtue of length of service was not "clearly established."

We agree that summary judgment on the qualified immunity issue was inappropriate at this time, but not precisely for the reason given by the district court. In this case, whether there was a violation of procedural due process will depend on whether there was any property right. If the regulation does not give plaintiffs de facto tenure, their case is over. Only if the court determines that they had de facto tenure would it be obliged to decide the qualified immunity defense.

In many cases, it may be possible to decide the qualified immunity question without reaching the merits and thereby avoid further proceedings. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). In the *Kovats* case, however, the legal issues are inextricably

intertwined with the factual issues. The evidence relevant to a determination of whether the regulation can be read to give de facto tenure would also be relevant in determining whether the individual defendants should have known that plaintiffs were entitled to de facto tenure. Apparently, there has been no discovery on the factual issues relating to the merits. In this posture, summary judgment on this issue would have been premature.

The *Varma* claim does not appear to fit into due process analysis as neatly as does the *Kovats* claim. Varma, of course, does not contend that she ever received de facto tenure. Nor does she contend that she did not receive a hearing before she was denied tenure. She claims, instead, that she was not evaluated for tenure in accord with the governing standards and procedures for tenure evaluations. Varma's brief summarizes her claim as follows: "that university regulations conferred on [her] the legitimate expectation that published procedure and criteria for tenure evaluation would be followed."[11] Appellees' Brief at 70.

In denying summary judgment on the qualified immunity claim, the district court stated that *Roth* and *Perry* clearly established that "[p]roperty rights may arise out of the tenure process provided that the procedure under which the claim is asserted was intended to act as a significant and substantive restriction on the University's discretion." *Varma v. Bloustein*, No. 84-2332, slip op. at 10 (D.N.J. Jun. 9,

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11. Because we do not reach the merits, we do not now consider whether Varma's claim implicates our precedent holding that "courts must be vigilant not to intrude into the institutional determination with regard to the evaluation of the performance of the tenure candidate." Gurmankin v. Costanzo, 626 F.2d 1115, 1125 (3d Cir. 1980) (citing Kunda v. Muhlenberg College, 621 F.2d 532, 547-48 (3d Cir. 1980)).

1986), VA at 447. The court found that Varma's claim implicated this clearly established law and, for that reason, denied Rutgers' motion for summary judgment on the qualified immunity issue.

The Rutgers individuals argue that what the district court should have addressed is whether it was clearly established that a candidate for promotion or tenure has a property interest in the standards and procedures used in evaluating a candidate. They rely on several cases which have held, after consideration on the merits, that specific university regulations governing criteria for promotion do not create property interests. *See Lovelace v. Southeastern Massachusetts University*, 793 F.2d 419, 422 (1st Cir. 1986); *Goodisman v. Lytle*, 724 F.2d 818, 820-21 (9th Cir. 1984); *Kilcoyne v. Morgan*, 664 F.2d 940, 942 (4th Cir. 1981), *cert. denied*, 456 U.S. 928 (1982).

In the *Varma* case, as in the *Kovats* case, the merits issue is intertwined with the qualified immunity issue. Without findings by the district court, it is difficult to ascertain whether Varma's claim falls under traditional constitutional principles or merely states a claim for breach of contract. For example, the Supreme Court has made clear that promises of specific procedures do not create interests protected by the Due Process clause. *See Olim v. Wakinekona*, 461 U.S. 238, 250 & n.12 (1983) ("expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause"). Following *Olim*, it appears that Varma's claim would have to be based on more than the regulations setting out procedures for tenure evaluations.

It may be that Varma will be able to find support for her claim in some other doctrinal source. Until the district court determines whether there is any property right, as alleged by Varma, it will not be possible to determine whether that right was clearly established.

Appendix D

In the procedural posture of this case, we will not speculate on the validity of Varma's merits claim. We hold merely that because the merits claim is inseparable, at least at this juncture, with the qualified immunity issue, the district court did not err in denying the motion of the individual Rutgers defendants for summary judgment on the qualified immunity doctrine.

IV.

Conclusion

For the reasons set forth above, we will remand this case to the district court for further proceedings.

SCIRICA, *District Judge*, Concurring.

I write separately to emphasize the basis for my decision to bar Rutgers from asserting Eleventh Amendment immunity.

As the majority observes, our Eleventh Amendment inquiry will vary depending on the unique existence and peculiar circumstances of each state-affiliated entity. *See* Maj. op. at 22-23 (citing *Soni v. Board of Trustees of the University of Tennessee*, 513 F.2d 347, 352 (6th Cir. 1975), *cert. denied*, 426 U.S. 919 (1976)). Thus, the state attributes of other entities may differ significantly from those of Rutgers.

I agree that with respect to Rutgers, New Jersey is not the "real, substantial party in interest." *See Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 101 (1984). I believe, however, that New Jersey's discretionary power to fund Rutgers is not a significant or dispositive factor in today's inquiry.

The majority states that "[a]ny increase in Rutgers' state appropriation as a result of a judgment against

Rutgers will be entirely the result of discretionary action by the state." Maj. op. at 15. This view fails to accord proper weight to the practical reality of the state's tie to Rutgers. To be sure, Rutgers has independent funding sources. Nevertheless, Rutgers is an integral part of New Jersey's public education system and either directly or indirectly the state will ensure the university's fiscal stability. For example, it is unlikely that New Jersey would allow a substantial judgment against Rutgers to jeopardize the University's well being.

This court recently addressed a similar situation involving a mix of public and independent funding for the Pennsylvania State System of Higher Education. *See Skehan v. State System of Higher Education*, 815 F.2d 244, 248 (3d Cir. 1987). In *Skehan*, however, the court held that under the multi-factor inquiry of *Urbano v. Board of Managers of New Jersey State Prison*, 415 F.2d 247, 250-51 (3d Cir. 1969), *cert. denied*, 397 U.S. 948 (1970), the state system was entitled to Eleventh Amendment immunity. *See Skehan*, 815 F.2d at 249. In reaching its holding, the court acknowledged the discretionary nature of state funding, but emphasized the state's interest in providing an affordable, high quality education to Pennsylvania students. *See id.* at 248. Thus, in a practical sense, a legislature's funding discretion is tempered by social policy favoring affordable, quality education.

Although *Skehan* and this case involve similar levels of state supervision and control (*e.g.*, gubernatorial appointments and state audits), Rutgers' status differs in other significant respects. In *Skehan*, Pennsylvania had preserved sovereign immunity for the state system and state colleges. *See id.* at 248-49. Here, however, New Jersey has immunized itself from judgment against Rutgers, and

allowed the university to sue and be sued. Similarly, in *Skehan*, the state system was governed by the Commonwealth's administrative code, *see id.* at 248, but in this case, Rutgers is not obligated to follow state civil service, competitive bidding, or administrative procedure requirements. Based on these circumstances, I agree that Rutgers is not an arm of the state for purposes of the Eleventh Amendment. Nevertheless, any Eleventh Amendment inquiry under *Urbano* involves a dynamic, ever-changing process.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX E — AFFIDAVIT OF WELLS H. KEDDIE DATED MAY 6, 1985 (EXHIBIT 6)

3.20. Duties required and evaluation of effectiveness.

3.21 The duties required of or anticipated from an appointee — such as effective teaching, accomplished research, other scholarly or creative activities, and other responsibilities — shall be made known by the department chairman to each appointee at the time of his appointment and then reviewed periodically with that appointee using procedures established by the faculty of the appointee's college, school or unit of the University. These procedures shall be consistent with common guidelines recommended by the University Senate.

3.22. To promote the effectiveness of the appointee's department and college and the university, the performance of the above (see 3.21) duties by each appointee shall be reviewed and evaluated periodically, as provided for in 2.87 of these regulations, using procedures established by the faculty of the appointee's college, school or unit of the university. These procedures shall be consistent with common guidelines recommended by the University Senate.

APPENDIX F — AFFIDAVIT OF SUSAN A. COLE DATED JUNE 19, 1985

EXHIBIT A

3.30. Promotions.

Promotions to higher ranks may be made in recognition of teaching effectiveness, scholarly or creative activity, research accomplishments, professional activity, and general usefulness to the University. The weight to be given to each of these factors will be determined in the light of the duties required and to be required of the appointee.

Appendix F

EXCERPTS FROM EXHIBIT B

FACULTY PERSONNEL ACTIONS — PROCEDURES

Recommendations for academic appointments, reappointments, and promotions to a particular rank normally originate at the departmental level and are made to the president through the provost or other appropriate officer by deans of colleges and schools, with the advice of a faculty committee on appointments and promotions, and with the advice of the tenured faculty at, or above, that particular rank in the appropriate department. A department committee shall provide documented evidence of the recommendee's professional qualifications. Non-tenured faculty and students may present their views to this committee and this committee should seek their opinions where appropriate.

* * *

The president refers to the Board of Governors all appointments and promotions which involve the acquiring of academic tenure, providing sufficient information about the candidate to enable the Board to arrive at an informed decision in each case. The same procedure will be followed whenever a person is to be promoted from one tenure rank to another.

Those responsible for academic appointments, reappointments, and promotions are to (1) base their recommendation of professional qualifications as defined in paragraph 3.30, page 50.9, without discrimination because of race, religion, sex, national origin, or views on any subject; (2) seek excellence; (3) utilize the judgments of faculty peers, normally including some facility at other institutions where the position ordinarily carries tenure; (4) utilize opinions of students, especially those with majors in the appropriate department.

Appendix F

EXCERPTS FROM EXHIBIT C

APPENDIX D

RUTGERS UNIVERSITY
THE STATE UNIVERSITY OF NEW JERSEY

POLICY
With Respect to
ACADEMIC APPOINTMENTS AND PROMOTIONS*

Approved by the University Senate
May 19, 1969

*As Amended by University Senate Action on March 11, 1974, and Further Amended on May 16, 1979.

Appendix F

* * *

Application of Criteria

The several criteria described above are not mutually exclusive but rather overlapping and complementary. It should be noted that the criteria are expressed in terms of the individual's accomplishments and not in terms of earned degrees, although these are important.

Those faculty members who have made the most important contributions to the University and have discharged their duties with the greatest distinction will be considered for promotion. Continued growth and continued contributions are required for all ranks. Advancement to a higher rank is not automatic.

It should be emphasized that the second sentence of the statute is of great importance. The weight to be given to each of the factors involved in judging promotion will differ, for several members of the faculty will necessarily have different duties.

* * *

It is exceedingly difficult to measure and judge the various ares of activity. Judgment in these matters can be made only by qualified colleagues. It is for that reason that recommendations for promotion are initiated at the department level, considered by committee on appointments and promotions within each college, passed upon by appropriate deans, considered by the senior staff members in each field in all divisions of the University, and reviewed by the Provost and the President. By this process, it is hoped that all significant information with respect to the services and accomplishments faculty members are rendering within their

department, within their college, within their scholarly field, and within the University will be brought out and compared with the services and accomplishments of other colleagues having the same or similar duties.

Such subjective judgment by persons competent to evaluate duties, responsibilities, services, and accomplishments will protect the interest of professors themselves, the department, the college, the University, and the students better than any objective rating that could be devised.

The full implementation of this policy is, of course, difficult. It is important that once it has been decided what a particular individual's area of responsibility is to be, he or she be judged with respect to the duties assigned. Thus, persons who are primarily teachers should be judged as teachers; persons who are primarily reasearch scholars should be judged as research scholars; persons who are primarily productive artists should be judged as productive artists; persons whose work is primarily in extension service should be judged by their ability to relate University research to community needs; persons whose tasks are principally developmental should be judged by the success with which they have developed the area of University life committed to them. In most cases, judgment will be a matter of balance among factors rather than exclusive emphasis upon one.

Promotion to Associate Professor

The most critical step in the promotion process is the step from assistant professor to associate professor, since this appointment normally involves academic tenure and means in effect that the University has abandoned its freedom of action with respect to the retention of a particular individual. After one

has attained an associate professorship, he or she still has freedom to resign, but the University no longer has freedom to dismiss, except for cause set forth in charges and proved before an appropriate committee of peers.

For this reason the greatest care should be exercised in promoting faculty members to the rank of associate professor. To attain this rank, a person must be adjudged to be someone who can be counted on to participate with colleagues in the determination for formulation of University policy and development with respect to his or her field of scholarship. There is probably something rather different in kind as well as in quality to be sought in an associate professor as distinct from an assistant professor.

In the case of suggested promotions to rank carrying with it academic tenure, it is desirable to obtain comparisons of a person's effectiveness with respect to colleagues in this University, and also professional standing with respect to colleagues in the relevant field elsewhere.

* * *

Appendix F

Rutgers University Statement on Tenure

Adopted by the University Senate
on November 23, 1976

I. Rutgers University adheres to the 1969 University Senate Statement entitled "Policy with Respect to Academic Appointments and Promotions." The University understands this statement as it relates to tenure to assert that tenure is not an automatic right to be awarded to all faculty members after a suitable probationary period nor does the statement mean that advancement to a higher rank is an automatic movement. It has been and continues to be the policy of the University to consider for promotion those members of the faculty who have made the most important contributions to the University, and who have discharged their duties with the greatest distinction.

II. The University recognizes that the award of faculty tenure is not automatic and that there are two kinds of factors which must be considered in the selection process leading to tenure: (1) the application of criteria fro the advancement of individual faculty members,* and (2) the determination of educational needs for faculty projected over a period of years.**

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* Academic Regulation 3.30. Promotion to higher ranks may be made in recognition of teaching effectiveness, scholarly or creative activity, research accomplishments, professional activity and general usefulness to the University. The weight to be given each of these factors will be determined in the light of the duties required and to be required of the appointee.

** Academic Regulation 4.24a. There shall be a Planning Committee in each faculty, which shall consist of no fewer than 5 members, with an option for student members if that faculty so chooses. The continuing duties of this

(Cont'd)

Appendix F

III. The determination of the educational needs of a School or College for full-time tenurable faculty should be made primarily by the faculty of the respective academic unit subject to the approval of the appropriate administrative officers whose judgment should reflect the needs of graduate and undergraduate education, including the needs of the professional and non-degree programs. These determinations should be adjusted to the fiscal resources and responsibilities of the University as set out by the Administration.

IV. The determinations require long-range planning coupled to the goals of the academic unit and require the estimation of the financial resource, enrollments, faculty turnover and attrition, and the relative needs of the programs of the School or College. The long-range planning should control the growth of programs and the number of faculty in the programs and should prevent or minimize over-expansion or reduction of faculty except through attrition.

V. With regard to the question of the distribution of tenured and non-tenured faculty, the University subscribes to the assertion

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(Cont'd)
committee will be to advise the dean 1) on program priorities in the areas of faculty line assignments, teaching, research, and service in relation to resources to be allocated to the college or school; 2) on long-range planning (3 to 5 years) in the areas listed in 1) above; and 3) to advise the University Senate Budget Committee on issues germane to the Budget Committee's functions. Each faculty will promulgate specific criteria and procedures by which the character and number of members of the Planning Committee will be determined to best serve the educational unit. Nothing in this regulation shall abrogate the duties or responsibilities of the dean and department chairpersons detailed in University Regulation 2.81 and 2.87 respectively, nor shall it in any way abrogate the rights and responsibilities of the faculties as stated in University statutes under statements on academic freedom.

of Committee A of AAUP that the "ratio of tenured faculty is itself the dynamic consequence of a complex of academic decisions and developments, each of which can be reconsidered. These include (1) the rate of growth of the institution and its faculty; (2) the fraction of those appointed initially to tenured or probationary positions; (3) the use of visiting faculty; (4) the use of graduate assistants; (5) the average length of the probationary period of non-tenured faculty members who ultimately achieve tenure; (6) the fraction of non-tenured faculty members who ultimately achieve tenure; (7) the institutional policy on retirements; and (8) the age distribution of the total faculty."***

*** On the Imposition of Tenure Quotas, Statement of Committee A, AAUP, *AAUP Bulletin*, Vol. 59, No. 4, Winter Issue, December 1973, Washington, D.C., 1973, p. 429.

APPENDIX G — AFFIDAVIT OF WELLS H. KEDDIE DATED NOVEMBER 25, 1987

* * *

Wells Hamilton Keddie, being duly sworn, deposes and says:

1. I am the President of plaintiff Rutgers Council of AAUP Chapters, and I make this affidavit in opposition to defendants' motion for summary judgment. I have been an officer and a grievance counselor for the AAUP for many years; for several years I was the chair of the grievance committee. I have personally assisted scores of faculty in the past ten years to process their grievances; under Article X of agreement between the AAUP and the administration. I am familiar, as an officer of the AAUP, with scores of other cases in which faculty were denied promotion to or within the tenured ranks.

* * *

4. There has been a common understanding among tenured faculty and union as to the meaning of the five criteria for appointments and promotions set forth in University Regulation 3.30. That understanding has been based on the Senate on Appointments and Promotion which requires comparison with those similarly situated, and on our observation of the achievements of persons who have been tenured and promoted as of the time they were tenured and promoted. By measuring the achievement of successful candidates, their peers and the nontenured faculty came to know the content of the standards as applied.

5. We are not aware of anyone who was denied tenure based on a lack of educational need as projected by planning committees or other formal mechanisms for predicting and shaping the future.

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6. There was a common understanding among tenured faculty and nontenured faculty that the regulations and the Senate Statements on Appointments and Promotions mean that candidates shall be granted tenure if they fulfill the criteria as defined by the achievements of past successful candidates in the performance of their assigned duties. This understanding was fostered by the administration, because all persons who fulfilled the criteria *were* granted tenure or promotion, and the administration has never publicly and formally altered the standards to be applied. Faculty have understood the Senate Statements to the effect that tenure or promotion is not "automatic" to refer to tenure or promotion automatically after the passage of a probationary period (except where successive reappointments have occurred in such way as to grant tenure pursuant to U.R. 60.1) or the passage of some years in rank. Faculty have understood and applied the concepts contained in these statements, that tenure or promotion *will* be granted, or is "automatic", if one fulfills the criteria, as generally understood, in the performance of one's duties.

7. Since the early 1980's, without the administration having formally announced a change in the contents of the criteria, the AAUP had noticed a pattern of departure from those criteria and from the fairness guaranteed by the regulations and instructions.

* * *

9. A review of the personnel files produced to us by defendants shows the reliance by the PRC on such criteria as a lack of: "quantity of research", "original (research) contributions of importance to the development of the discipline," "important original contributions," "impact," "analysis" in the outside

letters, and others terms not used in the regulations or Senate Statements, all of whose contents are commonly understood among faculty.

10. Despite the fact that the faculty have never been told by the administration that they intended to change the criteria for promotion and tenure, it is apparent to us that the administration, and especially the PRC, measures performance in a manner different from the criteria set forth in the regulations, as applied to us in the past, and as we continue to understand them. We do not know what the criteria are which the PRC applies. We do know, as the AAUP advised the Corson Committee, that excellence in teaching is wholly ignored, and only published research of a very narrow and conventional sort receives favorable consideration.

* * *

15. Persons being evaluated for tenure at Rutgers are in an "up or out" situation. If they are denied tenure, their employment at Rutgers will cease (usually after a one-year notice period). Rutgers administrators have a policy of refusing to rehire faculty denied tenure for any academic job position, even in different departments or on a different campus.

* * *

18. At least twenty grievances in the past five years have alleged prejudice against the school of thought in which the candidate's scholarship is conducted i.e., at least one-half of those grievances which have gone to hearing, that allegation was sustained.

Appendix G

19. The grievance process, combined with the reevaluation process, often takes two full academic years.

20. After faculty members are denied tenure, they experience great difficulty in finding new academic employment. They are often out of academic work for months or years after their one-year notice period expires. The market for university professors in New Jersey is quite limited; Rutgers with its general teaching and research mission is the only state university. Faculty denied tenure at Rutgers are viewed with suspicion by other institutions of higher education, which consider that Rutgers judgment that a person was not qualified for tenure is worthy of some deference.

20. Statements of reasons given by the PRC are cryptic and short, and often full of terms not used or understood by faculty and not contained in the regulations or policy statements. Consequently, they give faculty no guidance as to what criteria have been applied, especially where the PRC reverses strong or unanimous recommendations from lower levels.

* * *

APPENDIX H — FURTHER EXCERPTS OF POLICY WITH RESPECT TO ACADEMIC REPORTS AND PROMOTIONS

Teaching Effectiveness

As teachers, members of the faculty are responsible for effective instruction, whether at the undergraduate, graduate, or continuing education level. They should have both a depth and breadth of knowledge in their chosen field and be able to communicate this knowledge to their students. They should maintain an active interest in the advances and current thinking in their subject and be able to relate such information to their teaching in an organized manner. Effective teachers feel and exhibit enthusiasm for their subject and create an environment that stimulates imaginative thinking. They should have a deep interest in their students' progress and welfare. Moreover, they should maintain a critical attitude toward their teaching and strive continuously to improve it.

Scholarly/Creative Activity

Scholarly or creative activity should characterize academicians. If they function as scholars they are responsible to the University and to society to keep informed about advances in knowledge and to contribute to them. Typically, scholars engage in research work and produce publications. However, important and valuable scholarly activity may be carried on without being directed toward the production or research results. Such scholarship may be expressed in a variety of ways including teaching, advising, public lecturing,

enriching courses, compiling of information, or participating in organized professional activities. These activities may be more difficult to evaluate than research work and publications, but they are no less important.

Although artist faculty members may be scholars, they should have the unqualified option of being productive artists. Creative work in any field, such as literature, music, art, and drama, through its contributions to our cultural life, ranks equally with research and scholarly publications. Artist faculty members who want to concentrate on creative work appropriate to their field should feel free to do so.

Research Accomplishments

Research accomplishment is a result of scholarly activity. It is measured most commonly by publications, written by faculty members and their graduate students. However, this should not imply that all research work need result in published material.

Professional Activity/Public Service

This criterion considers the contributions that the faculty member makes to the advancement of his or her profession. This may be done by participation in the activities of the specialized professional groups that represent his or her field or work.

Appendix H

The criterion also considers public service activities of a faculty member. Public service of the faculty member is the application of academic expertise to governmental and community problems as well as service with special committees, boards, agencies and commissions. This public service should be accorded the recognition and support of the University.

A faculty member through such participation may increase his or her effectiveness as a professional worker, contribute to the improvement of the community, society and profession, and add to the prestige of the University.

General Usefulness

As participants in University affairs, faculty members are expected to contribute to the effective operation of one or more University divisions, to serve on committees, and to attend University functions. One gauge of their general usefulness is the number of different courses they might be able to teach. Another is their ability to represent the University conscientiously and accurately in outside activities.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-962

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MARGARET VARMA, *et al.*,

Petitioners,

–v.–

EDWARD J. BLOUSTEIN, *et al.*,

Respondents.

RUTGERS COUNCIL OF AAUP CHAPTERS,

Petitioner,

–v.–

EDWARD J. BLOUSTEIN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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JANUARY 1989

28 pp

QUESTION PRESENTED

1. Did the courts below correctly conclude, as a matter of fact and law, that petitioners did not have a constitutionally-protected property/liberty interest in the tenure review procedures and criteria at Rutgers, The State University of New Jersey?

PARTIES TO THE PROCEEDINGS

AND RULE 28.1 LIST

The parties to the proceedings below were petitioners Margaret Varma, on behalf of herself and "all others similarly situated", and Rutgers Council of AAUP Chapters, and respondents Edward J. Bloustein (President of Rutgers, The State University of New Jersey ("University" or "Rutgers")), T. Alexander Pond (Executive Vice President of Rutgers), Norman Samuels (Provost of the Newark campus at Rutgers), James Young (former Provost of the Newark campus at Rutgers), Walter Gordon (Provost of the Camden campus at Rutgers), Kenneth Wheeler (former Provost of the New Brunswick campus at Rutgers), Jean Parrish (former Acting Provost of the New Brunswick campus at Rutgers), Susan A. Cole (Vice President for University Administration and Personnel at Rutgers), Elizabeth Mitchell (former Assistant Vice President for Faculty Affairs at Rutgers), Robert Pack (Associate Provost for Personnel at the New Brunswick campus at Rutgers), Linda Stamato (former Member of the Rutgers Board of Governors), Donald Dickerson (former Member of the Rutgers Board of Governors), Floyd Bragg (Member of the Rutgers Board of Governors), Sanford Jaffe (former Member of the Rutgers Board of Governors), Robert Kaplan (former Member of the Rutgers Board of Governors), Harold Perl (Member of the Rutgers Board of Governors), Norman Reitman (Member of the Rutgers Board of Governors), Lawrence S. Schwartz (former Member of the Rutgers Board of Governors), David Werblin (Member of the Rutgers Board of Governors), Adrienne Anderson (Member of the Rutgers Board of Governors), Michael Bongiovanni (Member of the Rutgers Board of Governors), Peter Cartmell (Member of the Rutgers Board of Governors), Anthony Cicatiello (Member of the Rutgers Board of Governors), James Usry (Member of the Rutgers Board of Governors), Walter Wechsler (Member of the Rutgers Board of Governors), Rutgers, The State University of New Jersey, and the Promotion Review Committee at Rutgers. Several professors (Hans Fisher, Noemie Koller, Richard Poirier, Paul Fussell,

Lawrence Fisher, Jane Scanlon, Harvey Feder, and Amelie Rorty) were named as defendants in petitioners' original complaint but were not named as defendants in subsequently-filed amended complaints.

All of the individual respondents below were sued individually and in their corporate capacities.

Rutgers is a body corporate and politic under the laws of New Jersey and is an instrumentality of the State of New Jersey. N.J.S.A. 18A:65-2. Rutgers has no parent company and no subsidiaries. The following not-for-profit corporations are affiliates of Rutgers: The Corporation for the Application of Rutgers Research; The Rutgers University Foundation; and The Rutgers Research and Educational Foundation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MARGARET VARMA, *et al.*,

Petitioners,

—v.—

EDWARD J. BLOUSTEIN, *et al.*,

Respondents.

RUTGERS COUNCIL OF AAUP CHAPTERS,

Petitioner,

—v.—

EDWARD J. BLOUSTEIN, *et al.*,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for writ of certiorari. As explained more fully *infra*, there is no conflict among the circuit courts or with the constitutional principles set forth by this Court. All the circuit courts that have addressed the issue presented here have unanimously held that nontenured faculty members do not have a constitutionally-protected property/liberty interest in the tenure review procedures and criteria at state institutions of higher education. These circuit decisions as well as the decisions of this Court have rejected petitioners' contention that they have a constitutional entitlement to the grant of tenure.

STATEMENT OF THE CASE

A. Proceedings Below

In their complaints, petitioners Margaret Varma, on behalf of herself and others similarly situated, and Rutgers Council of AAUP Chapters ("AAUP") alleged that respondents failed to evaluate faculty candidates for tenure according to the procedures and criteria set forth in the University Regulations ("Regulations"), the University Academic Reappointment/Promotion Instructions ("Instructions"), and Article X of the collectively-negotiated agreement between the University and the AAUP ("Agreement"). Petitioners contended that Ms. Varma and the purported class have a constitutionally-protected interest, akin to a property interest, in the procedures and criteria provided by the aforesaid documents. Petitioners asserted that the alleged failure to act in accordance with said Regulations, Instructions, and Agreement violated their rights to due process under the Fourteenth Amendment.

In response to an earlier opinion of the Third Circuit in this case,[1] petitioners abandoned their original claim and instead argued before the trial court and then the Third Circuit that there existed among faculty members an "expectation" — a "common understanding" — that "the regulations and the Senate Statements . . . mean that candidates shall be granted tenure if they fulfill the criteria as defined by the achievements of past successful candidates in the performance of their assigned duties" (JA600-601; PA56).[2] Petitioners' argument was premised on their affiant's belief that "tenure or promotion *will* be granted, or is 'automatic', if one fulfills the criteria, as generally understood, in the performance of one's duties" (*id.*). However, all the relevant documents — all of which were before the courts

---

[1] *Kovats v. Rutgers, The State Univ.*, 822 F.2d 1303, 1314 (3d Cir. 1987) ("[P]romises of specific procedures do not create interests protected by the Due Process clause. *** Varma's claim would have to be based on more than the regulations setting out procedures for tenure evaluations."), *reprinted in* Petitioners' Appendix D, p.41.

[2] References herein to "JA" are to pages of the Joint Appendix filed in the Third Circuit. References to "PA" are to pages of the appendix to the Petition.

below — explicitly dispelled the idea that a nontenured faculty member is entitled to "automatic" tenure.

After reviewing the documentary evidence, the courts below held that petitioners' unsubstantiated claims were untenable in the face of the explicit written guidelines that did not place "the significant substantive restrictions on University discretion in tenure appointments required to create a protected property interest" (PA10-11). *Varma v. Bloustein*, No. 84-2332 (D.N.J. Jan. 12, 1988), *aff'd without op.*, 860 F.2d 1075 & 1077 (3d Cir. 1988).

B. Facts

In evaluating a faculty member for promotion and tenure, the evaluators do not judge the candidate in a vacuum or on the basis of one or two objective, hard-and-fast rules. Rather, a candidate's performance is evaluated on the basis of a multitude of subjective factors.[3] University Regulation 60.2a provides:

> Those responsible for academic appointments, reappointments, and promotions are to (1) base their *recommendation* of professional qualifications as defined in paragraph 3.30, page 50.9, without discrimination because of race, religion, sex, national origin, or views on any subject; (2) seek excellence; (3) utilize the judgments of faculty peers, normally including some faculty at other institutions where the position ordinarily carries tenure; (4) utilize opinions of students, especially those with majors in the appropriate department. [PA47; JA220 (emphasis added)]

University Regulation 3.30 adds:

> Promotions to higher ranks *may* be made in recognition of teaching effectiveness, scholarly or creative activity, research accomplishments, professional activity, and gen-

[3] The promotional criteria are established by and are within the sole province of the University. JA481, 295, 597; N.J.S.A. 18A:65-25(h); *Snitow v. Rutgers Univ.*, 103 N.J. 116, 124, 510 A.2d 1118, 1122 (1986). University Regulation 50.0 explicitly provides that "[n]o rule or regulation shall be so construed as to infringe in any way upon the powers and authority of the [University's] Board of Governors" (JA481).

eral usefulness to the University.[4] The weight to be given to each of these factors will be determined in the light of the duties required and to be required of the appointee.[5]

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[4] These criteria are not unique to the University. They are, in fact, the "traditional academic criteria" for tenure. *Keddie v. Pennsylvania State Univ.*, 412 F. Supp. 1264, 1269 n.2 (M.D. Pa. 1976). *Accord Beitzell v. Jeffrey*, 643 F.2d 870, 872 (1st Cir. 1981) (the "classical tenure requirements").

[5] PA46; JA218 (emphasis and footnote added). Petitioners claim that instead of applying the five criteria set forth in Regulation 3.30, the University has adopted new, secret criteria, such as: does the faculty member's work "impact" on his or her profession; "quantity of research"; and the existence of "important original contributions" (PA56; JA601). Their sole support for this claim is the conclusory, hearsay affidavit of Wells Keddie (*id.*). It is clear, however, from a review of the published documents and case law, that a faculty member's "impact" on his discipline, his "productivity", and his "originality" are relevant, legitimate, and articulated standards for determining whether a faculty member has met the five criteria.

Thus, during the tenure review process, the University specifically requests the outside evaluators to give their "assessment of the *originality* and *the impact* on [the candidate's] field of [the candidate's] research and publication, [the candidate's] scholarly or creative *productivity*, and the quality of [the candidate's] other contributions to the profession" (JA248-249 (emphasis added)). The letters of evaluations "are an important contribution to the determination of whether the candidate has achieved the professional standing in comparison with colleagues in the field elsewhere" (JA248-249, 242). The University Senate Policy With Respect to Academic Appointments and Promotions advises, *inter alia*, that faculty members "should maintain an active interest in the advances and current thinking of their subject[s]" and must keep informed about and contribute to the advances in their chosen fields (PA59-61; JA239-242). And the Corson Committee Report, so heavily relied upon by petitioners, stresses a basic reality of higher education: tenure candidates, *inter alia*, "must be at the leading edge of their individual fields", "must be the very best scholars and investigators in their respective fields", must produce a work product that "influence[s] the work of others in similar fields", and "should assume from the beginning that research productivity and scholarly achievement are the most important considerations in achieving tenure" (JA621, 624, 629).

It is indeed surprising that petitioners would claim that "impact", "quantity", and "originality" are foreign concepts in higher education. That claim is belied by the governing University documents, the education cases cited herein, and petitioners' affiant's own experience when he was denied tenure at The Pennsylvania State University. *See Keddie*, 412 F. Supp. at 1280-81, where the evaluators found, *inter alia*, that Professor Keddie had "no significant research in progress and . . . evidence[d] no inclination to begin anything truly 'new.' "

The subjective and general nature of the criteria set forth in Regulation 3.30 is recognized in the University Senate Policy With Respect to Academic Appointments and Promotions:[6]

> It is *exceedingly difficult* to measure and judge the various areas of activity [of a faculty member]. ***
>
> Such *subjective judgment* by persons competent to evaluate duties, responsibilities, services, and accomplishments will protect the interests of professors themselves, the department, the college, the University, and the students *better than any objective rating* that could be devised.[7]

Moreover, a candidate who meets the criteria of Regulation 3.30 is not guaranteed promotion and tenure. The discretionary language of Regulation 3.30 demonstrates that. Other factors are considered.[8] As the University Senate has stated:

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[6] The Senate Policy elaborates on the amorphous meaning of each of the five criteria. This elaboration is reprinted in Petitioners' Appendix H, pp. 59-61.

[7] PA49-50; JA241 (emphasis added). *See Snitow v. Rutgers*, 103 N.J. at 122, 510 A.2d at 1121 (" '[T]he peer review system has evolved as the most reliable method for assuring promotion of the candidates best qualified to serve the needs of the institution.' ").

[8] The Senate Policy commented:

> The most critical step in the promotion process is the step from assistant professor to associate professor, since this appointment normally involves academic tenure and means in effect that the University has abandoned its *freedom of action* with respect to the retention of a particular individual. After one has attained an associate professorship, he or she still has freedom to resign, but the University *no longer has freedom to dismiss, except for cause* set forth in charges and proved before an appropriate committee of peers.
>
> For this reason *the greatest care* should be exercised in promoting faculty members to the rank of associate professor. To attain this rank, a person must be adjudged to be someone who can be counted on to participate with colleagues in the determination for [sic] formulation of University policy and development with respect to his or her field of scholarship. There is probably *something rather different in kind as well as in quality* to be sought in an associate professor as distinct from an assistant professor.
>
> In the case of suggested promotions to rank carrying with it academic tenure, it is desirable to obtain comparisons of a person's effectiveness with respect to colleagues in this University, and also professional stand-

> Those faculty members who have made *the most important contributions* to the University and have discharged their duties with *the greatest distinction will be considered for promotion.* *** *Advancement to a higher rank is not automatic.* [PA49; JA240 (emphasis added)]

The University Senate Statement on Tenure reminds the faculty that the award of *tenure "is not an automatic right"* and that the educational needs of the University must be weighed before tenure is granted.[9]

When a faculty member is being evaluated for promotion to or within the tenured ranks, the evaluation process normally commences at the departmental level. A departmental peer review committee, composed of the department chair and all tenured members of the department at or above the academic rank for which the individual is being considered for promotion and tenure, meets for the purpose of evaluating and deciding whether to recommend the candidate for promotion and tenure. The peer review committee's aggregate recommendation, based on the committee members' individual review and subjective evaluation of the evidence, along with its narrative summary of the candidate's performance, are reported on Form No. 4, Part A. PA47, 49; JA206, 219-229, 236, 248-249, 258-260.

In reaching its decision, each evaluator reviews the candidate's promotion packet. The candidate may submit for inclusion in the promotion packet his *curriculum vitae*, a list of potential outside evaluators, and any other documents or materials he wishes to have considered. With the exception of the external confidential letters of evaluation and the official promo-

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ing with respect to colleagues in the relevant field elsewhere. [PA50-51; JA242 (emphasis added)]

[9] PA52; JA246 (emphasis added). The educational needs of the University are based on numerous parameters, such as program priorities, long-range planning, fiscal resources, and faculty mix (PA52-54; JA246-247). The University Senate has noted that Regulation 3.30, by its very nature, has to be general because, in part, "the divisions of the University which have different goals, functions, and specialty areas must formulate their own policies, within the framework of the statute, to ensure equitable treatment for their respective members" (JA239).

tion forms, the candidate is provided with a copy of all documents that are added to the promotion packet and is permitted to submit written responses or rebuttals to those documents.[10]

Following the completion of the departmental evaluation, the department chair, based on his review of the evidence and the subjective criteria, enters his own independent summary statement (including his recommendation) regarding the candidate's qualifications for promotion and tenure on Form No. 4, Part B. The department chair will notify the candidate, in writing, of the peer review committee's recommendation. JA206, 223, 228-230, 236, 261, 269, 272.

The Appointments and Promotions ("A&P") Committee then reviews the entire promotion packet and, in view of the subjective criteria, makes its own independent evaluation and recommendation regarding the candidate's qualifications for promotion and tenure on Form No. 5. The dean, after consideration of the complete promotion packet and the subjective criteria, makes his own independent recommendation on Form No. 6. Where applicable, the appropriate University-wide peer Section committee meets to independently evaluate the candidate's research accomplishments, scholarly/creative activities, and professional activities. The Section committee's independent recommendation is reported on Form No. 7. PA47, 49; JA219-220, 223, 229-231, 236, 263-267, 574-578.

The next level of review is the Promotion Review Committee ("PRC"), which is composed of the three campus Provosts, four senior members of the faculty, and the Executive Vice President. "The function of the [PRC] is to advise the President from a University-wide perspective on reappointments involving award of tenure and on promotions to or within the tenured ranks" (JA231). Members of the PRC do not participate at any other level of the evaluation process. PA49; JA220, 231, 236.

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[10] JA223-228, 268-271, 296-299. At the conclusion of the promotion process a faculty member is provided access to the official promotion forms. JA277, 285-289, 296-299.

Each PRC member individually studies the promotion packet in light of the criteria for evaluation, examines the basis and rigor of the judgments made at the earlier levels of review, and reaches an independent judgment on the candidate's suitability for promotion and tenure. The members of the PRC then meet to "discuss their assessments of the evidence, and in light of this discussion, they vote on the basis of their individual judgments concerning the proposed action" (JA232). If the official packet is found to be deficient, the PRC remands the matter to the appropriate level for completion and the matter is reprocessed through each intervening level of review. The PRC reports its independent recommendation in a memorandum addressed to the President. JA220, 223, 231-232, 236.

Finally,

> [a]fter considering all the evidence from these diverse sources, the President makes his own recommendations for reappointments and/or promotions involving the tenure ranks to the Board of Governors. The Board of Governors also considers all available information in reaching its own, final decision. [JA232]

All recommendations for promotion and tenure are merely advisory and are not binding on the Board of Governors; only the Board of Governors has the authority to promote a faculty member to or within the tenured ranks.[11] Each nontenured faculty member's employment contract explicitly states: "Academic tenure is conferred upon eligible faculty members solely by action of the Board of Governors of Rutgers—The State University. No administrative officer of the University has the authority to promise or to award such status to anyone under any circumstances" (JA597). Moreover, the evaluators at each level of review exercise independent judgment. "[T]hat is, judgments at each level should be based on all the evidence submitted to that level and should not merely rely on, or concur in, judgments at earlier levels" (JA223).

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[11] JA202, 219-220, 597; N.J.S.A. 18A:65-25(h); *Kovats v. Rutgers, The State Univ.*, 633 F. Supp. 1469, 1479 (D.N.J. 1986), *aff'd*, 822 F.2d 1303 (3d Cir. 1987); *Snitow v. Rutgers*, 103 N.J. at 122-23, 510 A.2d at 1121-22.

The faculty member concerned is given prompt notice of the final action taken in the review process. The faculty member may request from the dean a written explanation of the reasons for his non-reappointment or non-promotion. A disappointed faculty member may also invoke the detailed and comprehensive grievance procedures that are set forth in the Agreement. If the grievance is sustained, the University is required to rectify the defect that arose during the first tenure review and reevaluate the candidate.[12]

REASONS WHY THE PETITION SHOULD BE DENIED

THE DETERMINATION BELOW THAT PETITIONERS DO NOT HAVE A CONSTITUTIONALLY-PROTECTED PROPERTY/LIBERTY INTEREST IN THE TENURE REVIEW PROCEDURES AND CRITERIA IS IN COMPLETE ACCORD WITH THE DECISIONS OF EVERY OTHER CIRCUIT THAT HAS ADDRESSED THE ISSUE AND THE CONSTITUTIONAL PRINCIPLES SET FORTH BY THIS COURT.

After reviewing the documents governing the grant of tenure at the University, the courts below were compelled to come to the legal conclusion they reached. The governing documents, with clarity and no equivocation, provide that the decision to grant tenure is inherently subjective and solely within the discretion of the Board of Governors (PA10-11). The courts below correctly observed that the University's tenure review procedures and criteria simply did not "restrict the traditional discretion of university officials to make tenure awards" (PA15).[13]

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[12]JA232, 236, 269-299. *See Snitow v. Rutgers*, 103 N.J. at 123, 510 A.2d at 1122 (University's failure to fashion an appropriate remand remedy is grievable).

[13]Indeed, any such restriction would violate the express and unequivocal public policy of New Jersey that decisionmakers have unrestricted latitude with respect to tenure decisions. The New Jersey Supreme Court so stated in *Cammarata v. Essex County Park Comm.*, 26 N.J. 404, 412, 140 A.2d 397, 401 (1958):

Not surprisingly, every other circuit court to address the issue is in agreement. In *Goodisman v. Lytle*, 724 F.2d 818, 821 (9th Cir. 1984), the Ninth Circuit held that procedural steps and substantive guidelines for tenure review (such as "outstanding ability in teaching or research", "respect from colleagues", and "substantial contributions . . . to the University") do not create a constitutionally-protected interest triggering the due process clause:

> These guidelines do not significantly limit University officials' discretion in making tenure decisions. They provide only an outline of relevant considerations. They do not enhance a candidate's expectation of obtaining tenure enough to establish a constitutionally protected interest.

Similarly, in *Beitzell v. Jeffrey*, 643 F.2d 870, 875-76 (1st Cir. 1981), the First Circuit stated:

> Given the university's overall mission, the creation and transmission of knowledge, the very need for strong procedural protections to prevent the wrongful dismissal of a tenured teacher concomitantly suggests a need for wide discretion in making an initial tenure award. *** [T]he initial decision to grant tenure, like various other academic mat-

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> It is difficult to evaluate the character, industry, personality, and responsibility of an applicant from his performance on a written examination or through cursory personal interviews. Knowledge and intelligence do not alone make a good policeman. The crucial test of his fitness is how he fares on the job from day to day when suddenly confronted by situations demanding a breadth of resources and diplomacy. Many intangible qualities must be taken into account, and, since the lack of them may not constitute good cause for dismissal under a tenure statute, the park commission is entitled to a period of preliminary scrutiny, during which the protection of tenure does not apply, in order that it may make pragmatically informed and *unrestricted decisions* as to an applicant's suitability. [emphasis added]

This "same thoughtful philosophy applies with manifold emphasis to the selection of school teachers." *Zimmerman v. Bd. of Ed. of Newark*, 38 N.J. 65, 73, 183 A.2d 25, 30 (1962), *cert. den.*, 371 U.S. 956 (1963). *Accord Assoc. of N.J. State College Faculties v. Dungan*, 64 N.J. 338, 351, 316 A.2d 425, 432 (1974).

> ters, typically calls for the exercise of subjective judgment, confidential deliberation, and personal knowledge of both the candidate and the university community. *** These facts suggest why it would be objectively unreasonable for a probationary teacher to rely upon an award of tenure. *** And, they suggest the inappropriateness of courts determining what procedures universities ought to follow in making initial tenure awards.
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> [T]hose criteria did not set objective standards conferring an automatic right to tenure, nor did they create a reasonable expectation of receiving it. Rather, they simply reiterated the traditional criteria for promotion at universities: teaching, scholarship, and service. *** Aside from the mere existence of these criteria, there is not a word in the record suggesting that [the university's] "tenure" was meant to be granted routinely or to be withheld only for "cause", nor is there a word suggesting that the tenure procedure was meant to be less judgmental or subjective than elsewhere. [footnotes omitted]

No circuit has reached a contrary result. *See, e.g., Lovelace v. Southeastern Massachusetts Univ.*, 793 F.2d 419, 422, 424 (1st Cir. 1986) ("[b]y specifying in writing the usual criteria for promotion . . . a university does not thereby set objective criteria, constricting its traditional discretion or transforming a largely judgmental decisional process into an automatic right to, or property interest in, tenure"; fact that all prior tenure candidates were granted tenure does not create a protected property interest); *Kilcoyne v. Morgan*, 664 F.2d 940, 942 (4th Cir. 1981) (no property interest in university's tenure procedures and criteria), *cert. den.*, 456 U.S. 928 (1982); *Weinstein v. Univ. of Illinois*, 811 F.2d 1091, 1097-98 (7th Cir. 1987) (same, adding that "[t]he rule of law is clear enough that even a wilfully blind litigant cannot misunderstand"); *Wu v. Thomas*, 847 F.2d 1480, 1485 (11th Cir. 1988) ("a prospective promotion [in rank at a university] is not a property or liberty interest protected by the fourteenth amendment"); *Anderson v. City of Philadelphia*, 845 F.2d 1216, 1221 (3d Cir. 1988) (where the criteria for appoint-

ment or promotion are subjective and discretion is vested in the decisionmaker, a candidate for employment or promotion simply cannot have a tenable claim of entitlement to employment or promotion); *Griffith v. F.L.R.A.*, 842 F.2d 487, 496-501 (D.C. Cir. 1988) (the subjective nature of the governing criterion, the legislature's specific vesting of decisionmaking authority regarding promotions in the agency head, the fact that a promotion is involved, and the manifest need for flexibility combine to compel the conclusion that an employee has no protected property interest in merit pay increases/promotions); *Schwartz v. Mayor's Comm. on Judiciary of N.Y.*, 816 F.2d 54, 57 (2d Cir. 1987) (neither the mandatory procedures utilized by a judicial screening committee nor the fact that most incumbent judges had previously been reappointed create a property or liberty interest); *Dorr v. County of Butte*, 795 F.2d 875, 877-78 (9th Cir. 1986) ("[t]he power of the appointing authority to determine, on a purely subjective basis, whether a probationary employee has performed satisfactorily undercuts any expectation of continued employment"); *Graham v. Oklahoma City*, 859 F.2d 142, 146 (10th Cir. 1988) (a personnel manual setting forth circumstances constituting cause for discharge does not create a property interest in continued employment where statute vests supervisor with discretionary authority to determine whether an employee should be retained or dismissed); *Wells v. Bd. of Regents of Murray State Univ.*, 545 F.2d 15, 16-17 (6th Cir. 1976) (nontenured faculty members do not have protected property interests in continued employment where state law places exclusive authority in the Board of Regents to grant tenure and a formalized tenure procedure is in place); *Booher v. U.S. Postal Service*, 843 F.2d 943, 943-44 (6th Cir. 1988) (postal regulation allegedly requiring supervisor to advise probationary employee of his shortcomings and provide him an opportunity to conform does not give said employee a protected property interest in continued employment); *Samad v. Jenkins*, 845 F.2d 660, 663 (6th Cir. 1988) (faculty member does not have a protected property interest in being granted emeritus status where the grant of such status is within the discretion of his peers); *Stow v. Cochran*, 819 F.2d 864, 866-69 (8th Cir. 1987)

(procedural guidelines governing disciplinary actions, including discharge, and/or unauthorized oral assurances do not create a protected property interest in continued employment; *Lovelace, Weinstein,* and *Dorr* followed); *Yeghiayan v. U.S.*, 649 F.2d 847, 851-53 (Ct. Cl. 1981) (an administrative regulation enumerating grounds for separation of nontenured employees cannot limit the full scope of the discretion that the legislature has vested in the hiring authority; therefore, said employees do not have protected property interests in continued employment); *Banerjee v. Bd. of Trustees of Smith College*, 495 F. Supp. 1148, 1160-61 (D.Mass. 1980) (the fact that plaintiff was "measured against a more rigorous standard for tenure" than used in the past reflected the needs of the defendant-college to be more selective as the pool of qualified tenure candidates expanded and to avail itself of an opportunity to strengthen its faculty), *aff'd*, 648 F.2d 61 (1st Cir.), *cert. den.*, 454 U.S. 1098 (1981); *Clark v. Whiting*, 607 F.2d 634, 639-44 (4th Cir. 1979) (a university is not constitutionally required to apply same standards in evaluating plaintiff as it used "in the past" with respect to earlier candidates: "[a] teacher's competence and qualifications for tenure or promotion are by their very nature matters calling for highly subjective determinations, determinations which do not lend themselves to precise qualifications and are not susceptible to mechanical measurement"); *Davis v. Oregon State Univ.*, 591 F.2d 493, 495-96 (9th Cir. 1978) (oral assurances that tenure is granted as a matter of course do not create a property interest where the governing documents provide that tenure is not automatic and vests final authority to grant tenure in the president); *Upadhya v. Langenberg*, 834 F.2d 661, 663-67 (7th Cir. 1987) (oral assurances regarding length of employment, although accurate depictions of the past practices, "do not transmute probabilities into entitlements", particularly when the university regulations provide that nontenured faculty have contracts of limited duration and that only the president and board of trustees have the authority to bind the university to longer-term appointments), *cert. den.*, 486 U.S. , 108 S.Ct. 2016, 100 L.Ed.2d 603 (1988); *Fluker v. Alabama State Bd. of Ed.*, 441 F.2d 201, 207 (5th Cir. 1971) (plaintiffs were not

deprived of due process by failure of the university to apprise them of the standards for continued employment: "Appellants' proposal of this requirement also ignores the highly subjective nature of employer-employee relationships. *** [T]here are an enormous number of fact situations in which the nonreappointment of an employee may be justified by highly subjective and perhaps unforeseeable considerations.").

As a review of the Regulations, the Instructions, and the Agreement reveals, the procedures and criteria set forth in those documents, like those in the foregoing cases, do not in any way restrict the University's discretion in tenure matters.[14] Instead, the procedures and criteria serve as guidelines for the University to utilize when exercising its sole authority to make academic judgments in the evaluation process. Nothing in the record demonstrates that by setting forth procedures and subjective criteria for tenure review decisions, the University intended to relinquish its normal discretion and academic judgment in deciding (a) what procedures and criteria should be followed in making tenure awards and (b) who should be awarded tenure. Simply put, the University has advised probationary faculty members that they *may be* considered for tenure and has clearly stated that tenure is *not* an automatic right. The record and case law, both discussed in detail above, overwhelmingly compel the conclusion that the University has not relinquished its discretion. The law in New Jersey clearly places the University's academic responsibility for tenure on one and only one body, the Board of Governors. And, the record before this Court so demonstrates.

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[14]As petitioners readily admit (pp.13-19), their entire due process case is premised on a series of cases dealing with prisoner releases, transfers, and paroles. *See, e.g., Board of Pardons v. Allen*, 482 U.S. , 107 S.Ct. 2415, 96 L.Ed.2d 303 (1987); *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1 (1979). As the courts below ably noted, these cases not only are inapposite (PA9), but also further demonstrate that the tenure review procedures and criteria do not restrict the University's traditional discretion in such a manner as to give a tenure candidate a property/liberty interest in the tenure process or tenure itself (PA15). Nothing in the tenure review procedures and criteria evidences an intent to significantly limit the University's discretion or a requirement that all candidates that meet the five criteria of Regulation 3.30 must be granted tenure.

To accept petitioners' "automatic tenure" argument (PA56) would pervert the entire tenure system—as it exists at the University and other major research universities—and would directly contravene the documents governing employment at the University and the clear public policy of New Jersey. There is an inherent difference between tenured and nontenured faculty. For a tenured faculty member, "termination" or "discharge" must be based on adequate cause. However, a nontenured faculty member, at the end of his contract period, need not be rehired—no showing of adequate cause is required before a nontenured faculty member is not offered reemployment. What petitioners now seek here for nontenured faculty is *de facto* tenure, *i.e.*, that they cannot be discharged without adequate cause. Such a contention was rejected by this Court in *Board of Regents v. Roth*, 408 U.S. 564 (1972). In that case, the Court noted that none of the university documents provided that a nontenured faculty member would be rehired absent sufficient cause; such a contention was untenable because the governing rules provided that discharge for cause was applicable only to tenured faculty. 408 U.S. at 566-67 & n.3, 578. Simply put,

> It is unlikely in the extreme that an institution which has a formal tenure policy stated with precision in writing in a generally circulated and available faculty handbook has also developed an altogether inconsistent informal policy.[15]

This Court has made it clear that to have a property interest, petitioners clearly must have more than a subjective or "unilateral expectation" of receiving a specific benefit; they must, instead, have a "legitimate claim of entitlement" to it. *Roth*, 408 U.S. at 577. That claim must be based, at a minimum, on

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[15] *Sabet v. Eastern Virginia Medical Auth.*, 775 F.2d 1266, 1270 (4th Cir. 1985). *Accord Beitzell*, 643 F.2d at 876-77; *Cusumano v. Ratchford*, 507 F.2d 980, 984 (8th Cir. 1974) (the entire thrust of a formalized tenure provision is to prevent the creation of *de facto* tenure from some unwritten "common law" in a particular university), *cert. den.*, 423 U.S. 829 (1975); *Davis*, 591 F.2d at 495-96 (oral assurances regarding tenure insufficient where written tenure system exists); *Lovelace*, 793 F.2d at 423-24 (same); *Upadhya*, 834 F.2d at 663-67 (same).

"mutually explicit understandings" between the parties. *Perry v. Sindermann*, 408 U.S. 593, 601 (1972).

As the courts below recognized, there is no *mutually explicit* understanding between the individual petitioners and the University regarding "automatic" tenure.[16] None of the published documents provide (a) that nontenured faculty members are automatically entitled to tenure or (b) that nontenured faculty members must be rehired unless adequate cause for nonrenewal exists. The documents—in accordance with the mandate of New Jersey public policy[17]—clearly provide just the

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[16] Petitioners cannot cite to any documents that state that they have an automatic right to tenure. The only source they cite for this automatic tenure argument is an affidavit from Professor Keddie (PA56), the vast majority of which contains mere conclusory statements and hearsay. Petitioners did not present an affidavit from any member of the purported plaintiff class — including Ms. Varma, *the* class representative — that demonstrated that a class member in fact had this common understanding of automatic tenure and the source thereof. As the courts below held, the abstract, conclusory statements in Professor Keddie's affidavit were not sufficient to defeat respondents' summary judgment motion. Fed. R. Civ. P. 56(e); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). Moreover, even if the deficiencies in the Keddie affidavit are overlooked, that affidavit simply does not establish that there was a *mutually explicit* understanding between any class member and the University.

[17] The New Jersey Supreme Court has already rejected a plaintiff-union's argument that satisfactory classroom or professional performance mandates the award of tenure to faculty members. *Assoc. of N.J. State College Faculties v. Dungan*, 64 N.J. at 351, 316 A.2d at 432; *accord Zimmerman v. Bd. of Ed. of Newark*, 38 N.J. at 73-75, 183 A.2d at 29-31 (plaintiff's proffer of testimony of school principal to the effect that tenure would "automatically" follow when a teacher has received satisfactory ratings rejected as contrary to the law of New Jersey). In *Dungan*, the Supreme Court noted:

> Historically many considerations other than unsatisfactory classroom or professional performance have entered into discretionary determinations not to afford tenure and the determinations have not been interfered with judicially. *** [T]he educational priorities and institutional needs may properly be considered, along with the pertinent individual factors, in determining whether to grant tenure.

64 N.J. at 351-52, 316 A.2d at 432-33. The Supreme Court also took note of the accepted principle that an academic institution of higher education simply cannot grant tenure to all candidates who otherwise meet the requirements for tenure:

opposite: tenure is *not* automatic. The documents expressly provide that it is the tenured professor—not the nontenured faculty member—who has indefinite tenure and who can be dismissed only for adequate cause. The practice at the University simply reflects the reality of higher education: meeting the minimum standard of performance does not guarantee that tenure will be granted.[18]

Petitioners attempt to circumvent the foregoing case law by arguing that they have a liberty interest that has been wrongfully deprived by respondents. According to petitioners, this liberty interest includes the right to future employment as a Rutgers faculty member and the right to free speech (pp. 21-23).[19]

As the courts below recognized (PA13-15), the simple fact of the matter is that this Court, in *Roth* and *Sindermann*, rejected the existence of such liberty interests. First, in *Roth*, the Court noted two situations in the context of employment where the liberty interest would be "implicated": (1) " '[w]here a per-

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"[A]n institution in which all faculty members are tenured would find itself in an intolerable situation." It would "quickly stagnate internally and lose most, if not all, of its ability to develop and change over time, consistent with its need to be responsive to the society in which it exists." It must retain "a degree of flexibility in the allocation of its faculty resources" so that it may start new programs, introduce young scholars, and meet urgent social policy by conduct such as active recruitment of "minority and female faculty members."

64 N.J. at 342, 316 A.2d at 427-28.

[18] *See, e.g., Faro v. New York Univ.*, 502 F.2d 1229, 1232 (2d Cir. 1974) (in all walks of life, especially in businesses and the professions, of the numerous equally-qualified candidates, only one may be selected for tenure, or partnership, or vice-presidency, or judicial clerkship); *Banerjee*, 495 F. Supp. at 1155-56, 1160 (among a group of tenure candidates there will be faculty members "as to whom both a decision granting tenure and a decision denying tenure could be justified as a reasonable exercise of discretion by the tenure-decisionmaking body."); *Keddie*, 412 F. Supp. at 1269, 1274 (a university need not rehire faculty members who are merely competent; rather, the institution may limit tenure to those candidates who, subjectively, are deemed to be excellent).

[19] Petitioners' assertion that they have been deprived of academic freedom (pp.21-22) is not supported in the record by any competent evidence.

son's good name, reputation, honor, or integrity is at stake because of what the government is doing to him,' " and (2) where the State "imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." 408 U.S. at 573. Respondents have not published any charges of moral turpitude—such as dishonesty or immorality—against petitioners that have defamed them.[20] And respondents have not barred the petitioners from seeking employment at *other* state institutions of higher education in New Jersey or elsewhere.[21] Mere proof that petitioners' record of nonretention at the University "might make [them] somewhat less attractive to some *other* employers would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of 'liberty.' "[22]

Second, this Court specifically rejected the argument advanced by petitioners that a due process liberty interest exists

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[20] *Roth*, 408 U.S. at 573; *Keddie*, 412 F. Supp. at 1274 (nonrenewal on the basis of either professional incompetence or non-excellent performance does not implicate liberty interest); *Beitzell*, 643 F.2d at 878 ("the discussion of Beitzell's tenure credentials—whether he is an adequate teacher, scholar, member of the university community—[does not] threaten his reputation. . . . Such discussions accompany many, if not all, decisions to hire, or to promote, as well as to discharge, an employee"). No such wrongful conduct has been alleged by petitioners.

[21] *Roth*, 408 U.S. at 573; *Bishop v. Wood*, 426 U.S. 341, 348 (1976). Petitioners alleged that the denial of future employment *at Rutgers* violates due process (p. 23). If that were true, then every time a nontenured employee is denied tenure—*i.e.*, future employment—there would be a due process violation. *Roth* and *Bishop* clearly rejected that argument. Moreover, in New Jersey there are numerous other state institutions of higher education: New Jersey Institute of Technology, University of Medicine and Dentistry of New Jersey, and extensive state and community college systems.

[22] *Roth*, 408 U.S. at 574 n.13 (emphasis added). *Accord Keddie*, 412 F. Supp. at 1274; *Beitzell*, 643 F.2d at 878. *See Faro*, 502 F.2d at 1232 (a faculty member denied tenure "is in no way different from hundreds of others who find that they have to make adjustments in life" when their career goal (such as tenure or partnership) is not fulfilled); *Schwartz*, 816 F.2d at 57 (failure to be reappointed to a judgeship does not implicate a liberty interest).

where petitioner is allegedly discharged for exercising his right of free speech.[23] In sum, plaintiffs have not been deprived of any liberty interest.

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[23] *Roth*, 408 U.S. at 575 n.14; *Sindermann*, 408 U.S. at 599 n.5. Indeed, one court recently noted that "[j]udicial interference with a university's selection and retention of its faculty would be an interference with academic freedom." *Weinstein*, 811 F.2d at 1097 n.4. *See Snitow v. Rutgers*, 103 N.J. at 122, 510 A.2d at 1121 ("'"[T]he four essential freedoms" of a university' have been said to include the freedom 'to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.' "), *quoting Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring). Moreover, petitioners' reliance (p.21) on University documents concerning academic freedom as the source for their free speech claim is misplaced. Any alleged violation of the University's academic freedom guidelines would at most give rise to "a contract claim, not a constitutional one". *Lovelace*, 793 F.2d at 426 n.2.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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